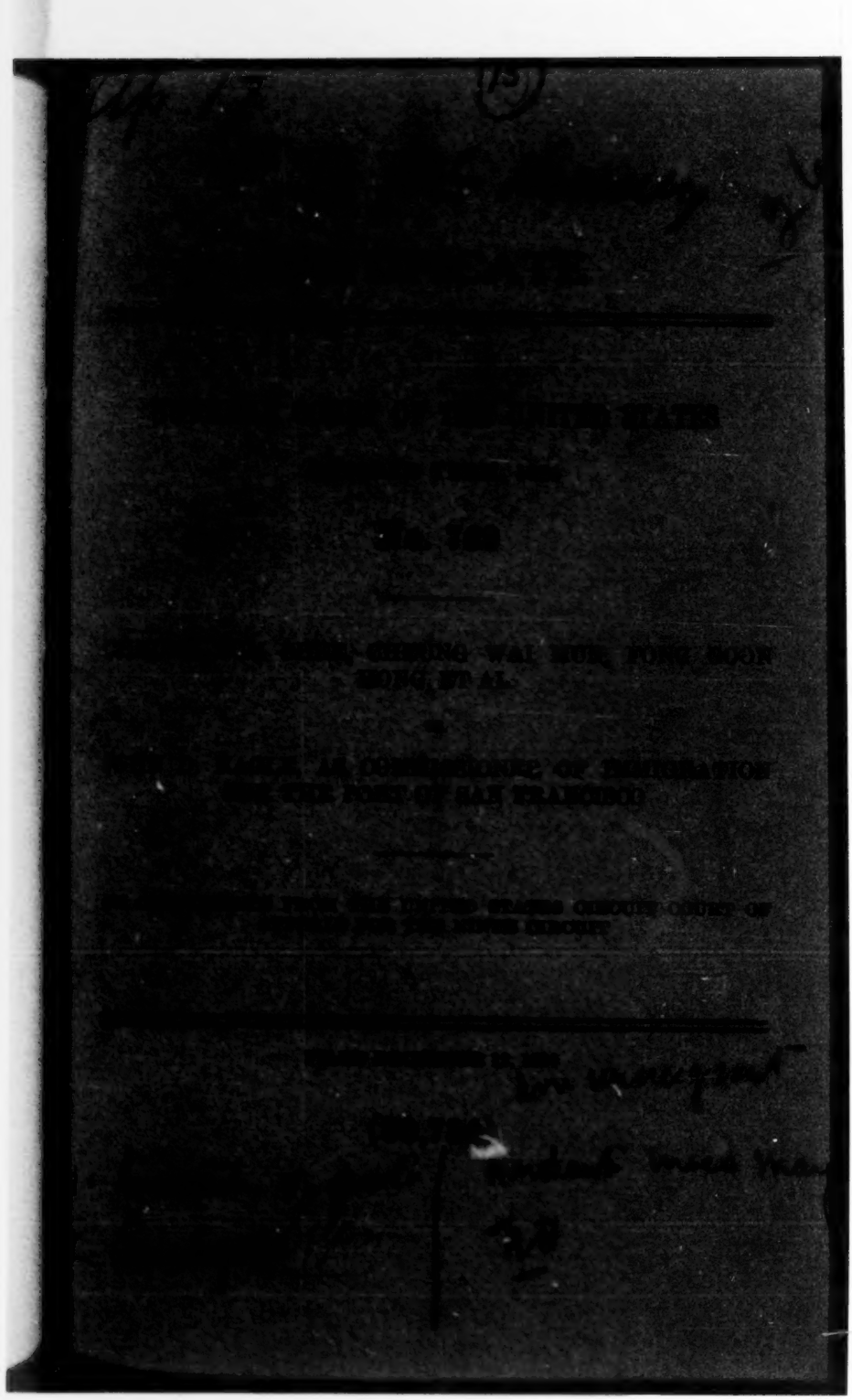

(30,734)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 769

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, ET AL.

vs.

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1924

[fol. 1]

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 4382

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, DER HING FONG, WONG BEN JUNG, HONG CHOW JUNG, MOK LING PARK, NG SHEE & WONG SHEE, on Habeas Corpus, Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, Appellee

Appeal from the United States District Court for the Northern District of California, Southern Division Thereof, Second Division

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code

Before Gilbert, Hunt, and Rudkin, Circuit Judges

STATEMENT OF FACTS

This action came to the Circuit Court of Appeals for the Ninth Circuit upon appeal from the judgment of the United States District Court for the Northern District of California, Southern Division thereof, Second Division, in favor of John D. Nagle, Commissioner of Immigration for the Port of San Francisco, respondent in the District Court, and against Cheung Sum Shee, Cheung Wai Mun, Fong Goon Hong, Der Hing Fong, Wong Ben Jung, Hong Chow Jung, Mok Ling Park, Ng Shee and Wong Shee, the petitioners in the District Court, and the appellants before this Court.

The action was to relieve the petitioners of the restraint imposed by the appellee. The petition for habeas corpus alleges that the appellants arrived at the Port of San Francisco on the SS. President Lin-
[fol. 2] coln on July 11th, 1924, and sought the right of permanent admission into the United States, they being respectively the wives or minor children of resident Chinese merchants lawfully domiciled within the United States, as in each instance specifically set forth in the petition. They were awaiting a setting of their cases for trial by the Commissioner of Immigration, and had the necessary witnesses all in readiness to appear for examination to establish their right of admission into the United States, under the terms of the treaties between the United States and China, and the Chinese Exclusion and Restriction Acts. The Commissioner did not accord the contemplated hearing, but caused each applicant to be solely ex-

amined in his own or her own case before a Board of Special Inquiry which thereupon denied each of them admission into — United States under the provisions of the Immigration Act of 1924 (effective July 1st, 1914). An appeal was at once taken to the Secretary of Labor, where suitable protests and briefs were filed, after which the Secretary of Labor dismissed the appeal in each instance and affirmed the excluding decision. The excluding decisions were substantially the same in each instance, and by way of illustration that of Cheung Sum Shee and her infant son Cheung Wai Mun is cited, the ground for the Secretary's ruling being as follows:

"Neither the mercantile status of the husband and father, nor the applicant's relationship to him, has been investigated for the reason that even if it were conceded that both these elements exist the applicants would be inadmissible as a matter of law. This is made necessary because of the inhibition against their coming to the United States as found in paragraph (c) of section 13 and that portion of section 5 which reads as follows: 'An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.' "

The petition alleges that there has been a misconstruction and a mistaken and wrongful interpretation of the Immigration Act of 1924, the effect of which has been to violate the treaty rights of appellants as specifically recognized by the act itself, and said incorrect [fol. 3] statutory construction violates and disregards the treaty and constitutional rights of appellants and their respective husbands and fathers. The petition was supplementally amended by filing the original immigration records in the case of each of the detained, and as so amended the appellee interposed a general demurrer, which was sustained by the lower court on October 25th, 1924, who thereupon refused to issue the writ of habeas corpus, as prayed for, and denied the petition, after which the case was immediately appealed and docketed in this Court.

The same legal propositions upon behalf of other such applicants for admission were presented before the United States District Court for the Western District of Washington at Seattle, which were decided favorably to the petitioners upon September 23rd, 1924; In re Goon Dip et als. on habeas corpus.

Question Certified

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instructions of the Supreme Court is:

1. Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying

for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?

Wm. B. Gilbert, Wm. H. Hunt, Frank H. Rudkin, Judges of the U. S. Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, California, November 13th, 1924.

CLERK'S CERTIFICATE

(Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed November 13, 1924. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

Attest:
A true copy.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. (Seal of the United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 4] [Endorsed:] No. 4382. In the United States Circuit Court of Appeals for the Ninth Circuit. Cheung Sum Shee, Cheung Wai Mun, Fong Goon Hong, Der Hing Fong, Wong Ben Jung, Hong Chow Jung, Mok Ling Park, Ng Shee and Wong Shee, on habeas corpus, Appellants, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco. Appeal from the United States District Court of Appeals for the Northern District of California, Southern Division thereof, Second Division. Certified copy of certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying a certain question or proposition of law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Endorsed on cover: File No. 30,734. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 769. Cheung Sum Shee, Cheung Wai Mun, Fong Goon Hong, et al. vs. John D. Nagle, Commissioner of Immigration for the Port of San Francisco. (Certificate.) Filed December 12th, 1924. File No. 30,734.

769 + 770

[PUBLIC—No. 139—68TH CONGRESS.]

[H. R. 7995.]

An Act To limit the immigration of aliens into the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Immigration Act of 1924."

IMMIGRATION VISAS.

SEC. 2. (a) A consular officer upon the application of any immigrant (as defined in section 3) may (under the conditions hereinafter prescribed and subject to the limitations prescribed in this Act or regulations made thereunder as to the number of immigration visas which may be issued by such officer) issue to such immigrant an immigration visa which shall consist of one copy of the application provided for in section 7, visaed by such consular officer. Such visa shall specify (1) the nationality of the immigrant; (2) whether he is a quota immigrant (as defined in section 5) or a non-quota immigrant (as defined in section 4); (3) the date on which the validity of the immigration visa shall expire; and (4) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed.

(b) The immigrant shall furnish two copies of his photograph to the consular officer. One copy shall be permanently attached by the consular officer to the immigration visa and the other copy shall be disposed of as may be by regulations prescribed.

(c) The validity of an immigration visa shall expire at the end of such period, specified in the immigration visa, not exceeding four months, as shall be by regulations prescribed. In the case of an immigrant arriving in the United States by water, or arriving by water in foreign contiguous territory on a continuous voyage to the United States, if the vessel, before the expiration of the validity of his immigration visa, departed from the last port outside the United States and outside foreign contiguous territory at which the immigrant embarked, and if the immigrant proceeds on a continuous voyage to the United States, then, regardless of the time of his arrival in the United States, the validity of his immigration visa shall not be considered to have expired.

(d) If an immigrant is required by any law, or regulations or orders made pursuant to law, to secure the visa of his passport by a consular officer before being permitted to enter the United States, such immigrant shall not be required to secure any other visa of his passport than the immigration visa issued under this Act, but a record of the number and date of his immigration visa shall be noted on his passport without charge therefor. This subdivision shall not apply to an immigrant who is relieved, under subdivision (b) of section 13, from obtaining an immigration visa.

(e) The manifest or list of passengers required by the immigration laws shall contain a place for entering thereon the date, place of issuance, and number of the immigration visa of each immigrant. The immigrant shall surrender his immigration visa to the immigration officer at the port of inspection, who shall at the time of inspection indorse on the immigration visa the date, the port of entry, and the name of the vessel, if any, on which the immigrant arrived. The immigration visa shall be transmitted forthwith by the immigration officer in charge at the port of inspection to the Department of Labor under regulations prescribed by the Secretary of Labor.

(f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this Act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.

(g) Nothing in this Act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws. The substance of this subdivision shall be printed conspicuously upon every immigration visa.

(h) A fee of $9 shall be charged for the issuance of each immigration visa, which shall be covered into the Treasury as miscellaneous receipts.

DEFINITION OF "IMMIGRANT."

SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NON-QUOTA IMMIGRANTS.

SEC. 4. When used in this Act the term "non-quota immigrant" means—

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or

(e) An immigrant who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn.

QUOTA IMMIGRANTS.

SEC. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

PREFERENCES WITHIN QUOTAS.

SEC. 6. (a) In the issuance of immigration visas to quota immigrants preference shall be given—

(1) To a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife, of a citizen of the United States who is 21 years of age or over; and

(2) To a quota immigrant who is skilled in agriculture, and his wife, and his dependent children under the age of 16 years, if accompanying or following to join him. The preference provided in this paragraph shall not apply to immigrants of any nationality the annual quota for which is less than 300.

(b) The preference provided in subdivision (a) shall not in the case of quota immigrants of any nationality exceed 50 per centum of the annual quota for such nationality. Nothing in this section shall be construed to grant to the class of immigrants specified in paragraph (1) of subdivision (a) a priority in preference over the class specified in paragraph (2).

(c) The preference provided in this section shall, in the case of quota immigrants of any nationality, be given in the calendar

month in which the right to preference is established, if the number of immigration visas which may be issued in such month to quota immigrants of such nationality has not already been issued; otherwise in the next calendar month.

APPLICATION FOR IMMIGRATION VISA.

SEC. 7. (a) Every immigrant applying for an immigration visa shall make application therefor in duplicate in such form as shall be by regulations prescribed.

(b) In the application the immigrant shall state (1) the immigrant's full and true name; age, sex, and race; the date and place of birth; places of residence for the five years immediately preceding his application; whether married or single, and the names and places of residence of wife or husband and minor children, if any; calling or occupation; personal description (including height, complexion, color of hair and eyes, and marks of identification); ability to speak, read, and write; names and addresses of parents, and if neither parent living, then the name and address of his nearest relative in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry; whether he has a ticket through to such final destination; whether going to join a relative or friend, and, if so, what relative or friend and his name and complete address; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; whether ever in prison or almshouse; whether he or either of his parents has ever been in an institution or hospital for the care and treatment of the insane; (2) if he claims to be a non-quota immigrant, the facts on which he bases such claim; and (3) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws, as may be by regulations prescribed.

(c) The immigrant shall furnish, if available, to the consular officer, with his application, two copies of his "dossier" and prison record and military record, two certified copies of his birth certificate, and two copies of all other available public records concerning him kept by the Government to which he owes allegiance. One copy of the documents so furnished shall be permanently attached to each copy of the application and become a part thereof. An immigrant having an unexpired permit issued under the provisions of section 10 shall not be subject to this subdivision. In the case of an application made before September 1, 1924, if it appears to the satisfaction of the consular officer that the immigrant has obtained a visa of his passport before the enactment of this Act, and is unable to obtain the documents referred to in this subdivision without undue expense and delay, owing to absence from the country from which such documents should be obtained, the consular officer may relieve such immigrant from the requirements of this subdivision.

(d) In the application the immigrant shall also state (to such extent as shall be by regulations prescribed) whether or not he is a member of each class of individuals excluded from admission to

the United States under the immigration laws, and such classes shall be stated on the blank in such form as shall be by regulations prescribed, and the immigrant shall answer separately as to each class.

(e) If the immigrant is unable to state that he does not come within any of the excluded classes, but claims to be for any legal reason exempt from exclusion, he shall state fully in the application the grounds for such alleged exemption.

(f) Each copy of the application shall be signed by the immigrant in the presence of the consular officer and verified by the oath of the immigrant administered by the consular officer. One copy of the application, when visaed by the consular officer, shall become the immigration visa, and the other copy shall be disposed of as may be by regulations prescribed.

(g) In the case of an immigrant under eighteen years of age the application may be made and verified by such individual as shall be by regulations prescribed.

(h) A fee of $1 shall be charged for the furnishing and verification of each application, which shall include the furnishing and verification of the duplicate, and shall be covered into the Treasury as miscellaneous receipts.

NON-QUOTA IMMIGRATION VISAS.

SEC. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant.

ISSUANCE OF IMMIGRATION VISAS TO RELATIVES.

SEC. 9. (a) In case of any immigrant claiming in his application for an immigration visa to be a non-quota immigrant by reason of relationship under the provisions of subdivision (a) of section 4, or to be entitled to preference by reason of relationship to a citizen of the United States under the provisions of section 6, the consular officer shall not issue such immigration visa or grant such preference until he has been authorized to do so as hereinafter in this section provided.

(b) Any citizen of the United States claiming that any immigrant is his relative, and that such immigrant is properly admissible to the United States as a non-quota immigrant under the provisions of subdivision (a) of section 4 or is entitled to preference as a relative under section 6, may file with the Commissioner General a petition in such form as may be by regulations prescribed, stating (1) the petitioner's name and address; (2) if a citizen by birth, the date and place of his birth; (3) if a naturalized citizen, the date and place of his admission to citizenship and the number of his certificate, if any; (4) the name and address of his employer or the address of his place of business or occupation if he is not an employee; (5) the degree of the relationship of the immigrant for whom such petition is made, and the names of all the places where

such immigrant has resided prior to and at the time when the petition is filed; (6) that the petitioner is able to and will support the immigrant if necessary to prevent such immigrant from becoming a public charge; and (7) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed.

(c) The petition shall be made under oath administered by any individual having power to administer oaths, if executed in the United States, but, if executed outside the United States, administered by a consular officer. The petition shall be supported by any documentary evidence required by regulations prescribed under this Act. Application may be made in the same petition for admission of more than one individual.

(d) The petition shall be accompanied by the statements of two or more responsible citizens of the United States, to whom the petitioner has been personally known for at least one year, that to the best of their knowledge and belief the statements made in the petition are true and that the petitioner is a responsible individual able to support the immigrant or immigrants for whose admission application is made. These statements shall be attested in the same way as the petition.

(e) If the Commissioner General finds the facts stated in the petition to be true, and that the immigrant in respect of whom the petition is made is entitled to be admitted to the United States as a non-quota immigrant under subdivision (a) of section 4 or is entitled to preference as a relative under section 6, he shall, with the approval of the Secretary of Labor, inform the Secretary of State of his decision, and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed to issue the immigration visa or grant the preference.

(f) Nothing in this section shall be construed to entitle an immigrant, in respect of whom a petition under this section is granted, to enter the United States as a non-quota immigrant, if, upon arrival in the United States, he is found not to be a non-quota immigrant.

PERMIT TO REENTER UNITED STATES AFTER TEMPORARY ABSENCE.

SEC. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner General for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to

whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

(d) For the issuance of the permit, and for each extension thereof, there shall be paid a fee of $3, which shall be covered into the Treasury as miscellaneous receipts.

(e) Upon the return of the alien to the United States the permit shall be surrendered to the immigration officer at the port of inspection.

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

NUMERICAL LIMITATIONS.

SEC. 11. (a) The annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100.

(b) The annual quota of any nationality for the fiscal year beginning July 1, 1927, and for each fiscal year thereafter, shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin (ascertained as hereinafter provided in this section) bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

(c) For the purpose of subdivision (b) national origin shall be ascertained by determining as nearly as may be, in respect of each geographical area which under section 12 is to be treated as a separate country (except the geographical areas specified in subdivision (c) of section 4) the number of inhabitants in continental United States in 1920 whose origin by birth or ancestry is attributable to such geographical area. Such determination shall not be made by tracing the ancestors or descendants of particular individuals, but shall be based upon statistics of immigration and emigration, together with rates of increase of population as shown by successive decennial United States censuses, and such other data as may be found to be reliable.

(d) For the purpose of subdivisions (b) and (c) the term "inhabitants in continental United States in 1920" does not include (1) immigrants from the geographical areas specified in subdivision (c) of section 4 or their descendants, (2) aliens ineligible to citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of American aborigines.

(e) The determination provided for in subdivision (c) of this section shall be made by the Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly. In making such determination such officials may call for information and expert assistance from the Bureau of the Census. Such officials shall,

jointly, report to the President the quota of each nationality, determined as provided in subdivision (b), and the President shall proclaim and make known the quotas so reported. Such proclamation shall be made on or before April 1, 1927. If the proclamation is not made on or before such date, quotas proclaimed therein shall not be in effect for any fiscal year beginning before the expiration of 90 days after the date of the proclamation. After the making of a proclamation under this subdivision the quotas proclaimed therein shall continue with the same effect as if specifically stated herein, and shall be final and conclusive for every purpose except (1) in so far as it is made to appear to the satisfaction of such officials and proclaimed by the President, that an error of fact has occurred in such determination or in such proclamation, or (2) in the case provided for in subdivision (c) of section 12. If for any reason quotas proclaimed under this subdivision are not in effect for any fiscal year, quotas for such year shall be determined under subdivision (a) of this section.

(f) There shall be issued to quota immigrants of any nationality (1) no more immigration visas in any fiscal year than the quota for such nationality, and (2) in any calendar month of any fiscal year no more immigration visas than 10 per centum of the quota for such nationality, except that if such quota is less than 300 the number to be issued in any calendar month shall be prescribed by the Commissioner General, with the approval of the Secretary of Labor, but the total number to be issued during the fiscal year shall not be in excess of the quota for such nationality.

(g) Nothing in this Act shall prevent the issuance (without increasing the total number of immigration visas which may be issued) of an immigration visa to an immigrant as a quota immigrant even though he is a non-quota immigrant.

NATIONALITY.

SEC. 12. (a) For the purposes of this Act nationality shall be determined by country of birth, treating as separate countries the colonies, dependencies, or self-governing dominions, for which separate enumeration was made in the United States census of 1890; except that (1) the nationality of a child under twenty-one years of age not born in the United States, accompanied by its alien parent not born in the United States, shall be determined by the country of birth of such parent if such parent is entitled to an immigration visa, and the nationality of a child under twenty-one years of age not born in the United States, accompanied by both alien parents not born in the United States, shall be determined by the country of birth of the father if the father is entitled to an immigration visa; and (2) if a wife is of a different nationality from her alien husband and the entire number of immigration visas which may be issued to quota immigrants of her nationality for the calendar month has already been issued, her nationality may be determined by the country of birth of her husband if she is accompanying him and he is entitled to an immigration visa, unless the total number of immigration visas which may be issued to quota immigrants of the nationality of the husband for the calendar month has already been issued. An immigrant born in the United States who has lost his United States

citizenship shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country, then in the country from which he comes.

(b) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this Act, prepare a statement showing the number of individuals of the various nationalities resident in continental United States as determined by the United States census of 1890, which statement shall be the population basis for the purposes of subdivision (a) of section 11. In the case of a country recognized by the United States, but for which a separate enumeration was not made in the census of 1890, the number of individuals born in such country and resident in continental United States in 1890, as estimated by such officials jointly, shall be considered for the purposes of subdivision (a) of section 11 as having been determined by the United States census of 1890. In the case of a colony or dependency existing before 1890, but for which a separate enumeration was not made in the census of 1890 and which was not included in the enumeration for the country to which such colony or dependency belonged, or in the case of territory administered under a protectorate, the number of individuals born in such colony, dependency, or territory, and resident in continental United States in 1890, as estimated by such officials jointly, shall be considered for the purposes of subdivision (a) of section 11 as having been determined by the United States census of 1890 to have been born in the country to which such colony or dependency belonged or which administers such protectorate.

(c) In case of changes in political boundaries in foreign countries occurring subsequent to 1890 and resulting in the creation of new countries, the Governments of which are recognized by the United States, or in the establishment of self-governing dominions, or in the transfer of territory from one country to another, such transfer being recognized by the United States, or in the surrender by one country of territory, the transfer of which to another country has not been recognized by the United States, or in the administration of territories under mandates, (1) such officials, jointly, shall estimate the number of individuals resident in continental United States in 1890 who were born within the area included in such new countries or self-governing dominions or in such territory so transferred or surrendered or administered under a mandate, and revise (for the purposes of subdivision (a) of section 11) the population basis as to each country involved in such change of political boundary, and (2) if such changes in political boundaries occur after the determination provided for in subdivision (c) of section 11 has been proclaimed, such officials, jointly, shall revise such determination, but only so far as necessary to allot the quotas among the countries involved in such change of political boundary. For the purpose of such revision and for the purpose of determining the nationality of an immigrant, (A) aliens born in the area included in any such new country or self-governing dominion shall be considered as having been born in such country or dominion, and aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred, and (B) territory so surrendered or

administered under a mandate shall be treated as a separate country. Such treatment of territory administered under a mandate shall not constitute consent by the United States to the proposed mandate where the United States has not consented in a treaty to the administration of the territory by a mandatory power.

(d) The statements, estimates, and revisions provided in this section shall be made annually, but for any fiscal year for which quotas are in effect as proclaimed under subdivision (e) of section 11, shall be made only (1) for the purpose of determining the nationality of immigrants seeking admission to the United States during such year, or (2) for the purposes of clause (2) of subdivision (c) of this section.

(e) Such officials shall, jointly, report annually to the President the quota of each nationality under subdivision (a) of section 11, together with the statements, estimates, and revisions provided for in this section. The President shall proclaim and make known the quotas so reported and thereafter such quotas shall continue, with the same effect as if specifically stated herein, for all fiscal years except those years for which quotas are in effect as proclaimed under subdivision (e) of section 11, and shall be final and conclusive for every purpose.

EXCLUSION FROM UNITED STATES.

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

(e) No quota immigrant shall be admitted under subdivision (d) if the entire number of immigration visas which may be issued

to quota immigrants of the same nationality for the fiscal year has already been issued. If such entire number of immigration visas has not been issued, then the Secretary of State, upon the admission of a quota immigrant under subdivision (d), shall reduce by one the number of immigration visas which may be issued to quota immigrants of the same nationality during the fiscal year in which such immigrant is admitted; but if the Secretary of State finds that it will not be practicable to make such reduction before the end of such fiscal year, then such immigrant shall not be admitted.

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under section 16.

DEPORTATION.

SEC. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917: *Provided*, That the Secretary of Labor may, under such conditions and restrictions as to support and care as he may deem necessary, permit permanently to remain in the United States, any alien child who, when under sixteen years of age was heretofore temporarily admitted to the United States and who is now within the United States and either of whose parents is a citizen of the United States.

MAINTENANCE OF EXEMPT STATUS.

SEC. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States.

PENALTY FOR ILLEGAL TRANSPORTATION.

SEC. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or

transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

ENTRY FROM FOREIGN CONTIGUOUS TERRITORY.

SEC. 17. The Commissioner General, with the approval of the Secretary of Labor, shall have power to enter into contracts with transportation lines for the entry and inspection of aliens coming to the United States from or through foreign contiguous territory. In prescribing rules and regulations and making contracts for the entry and inspection of aliens applying for admission from or through foreign contiguous territory due care shall be exercised to avoid any discriminatory action in favor of transportation companies transporting to such territory aliens destined to the United States, and all such transportation companies shall be required, as a condition precedent to the inspection or examination under such rules and contracts at the ports of such contiguous territory of aliens brought thereto by them, to submit to and comply with all the requirements of this Act which would apply were they bringing such aliens directly to ports of the United States. After this section takes effect no alien applying for admission from or through foreign contiguous territory (except an alien previously lawfully admitted to the United States who is returning from a temporary visit to such territory) shall be permitted to enter the United States unless upon proving that he was brought to such territory by a transportation company which had submitted to and complied with all the requirements of this Act, or that he entered, or has resided in, such territory more than two years prior to the time of his application for admission to the United States.

UNUSED IMMIGRATION VISAS.

SEC. 18. If a quota immigrant of any nationality having an immigration visa is excluded from admission to the United States under the immigration laws and deported, or does not apply for admission to the United States before the expiration of the validity of the immigration visa, or if an alien of any nationality having an immigration visa issued to him as a quota immigrant is found not to be a quota immigrant, no additional immigration visa shall be issued in lieu thereof to any other immigrant.

ALIEN SEAMEN.

SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.

SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Secretary of Labor.

(c) If the Secretary of Labor finds that deportation of the alien seaman on the vessel on which he arrived would cause undue hardship to such seaman he may cause him to be deported on another vessel at the expense of the vessel on which he arrived, and such vessel shall not be granted clearance until such expense has been paid or its payment guaranteed to the satisfaction of the Secretary of Labor.

(d) Section 32 of the Immigration Act of 1917 is repealed, but shall remain in force as to all vessels, their owners, agents, consignees, and masters, and as to all seamen, arriving in the United States prior to the enactment of this Act.

(i) The term "Commissioner General" means the Commissioner General of Immigration;

(j) The term "application for admission" has reference to the application for admission to the United States and not to the application for the issuance of the immigration visa;

(k) The term "permit" means a permit issued under section 10;

(l) The term "unmarried," when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married;

(m) The terms "child," "father," and "mother," do not include a child or parent by adoption unless the adoption took place before January 1, 1924;

(n) The terms "wife" and "husband" do not include a wife or husband by reason of a proxy or picture marriage.

AUTHORIZATION OF APPROPRIATION.

SEC. 29. The appropriation of such sums as may be necessary for the enforcement of this Act is hereby authorized.

ACT OF MAY 19, 1921.

SEC. 30. The Act entitled "An Act to limit the immigration of aliens into the United States," approved May 19, 1921, as amended and extended, shall, notwithstanding its expiration on June 30, 1924, remain in force thereafter for the imposition, collection, and enforcement of all penalties that may have accrued thereunder, and any alien who prior to July 1, 1924, may have entered the United States in violation of such Act or regulations made thereunder may be deported in the same manner as if such Act had not expired.

TIME OF TAKING EFFECT.

SEC. 31. (a) Sections 2, 8, 13, 14, 15, and 16, and subdivision (f) of section 11, shall take effect on July 1, 1924, except that immigration visas and permits may be issued prior to that date, which shall not be valid for admission to the United States before July 1, 1924. In the case of quota immigrants of any nationality, the number of immigration visas to be issued prior to July 1, 1924, shall not be in excess of 10 per centum of the quota for such nationality, and the number of immigration visas so issued shall be deducted from the number which may be issued during the month of July, 1924. In the case of immigration visas issued before July 1, 1924, the four-month period referred to in subdivision (c) of section 2 shall begin to run on July 1, 1924, instead of at the time of the issuance of the immigration visa.

(b) The remainder of this Act shall take effect upon its enactment.

(c) If any alien arrives in the United States before July 1, 1924, his right to admission shall be determined without regard to the provisions of this Act, except section 23

SAVING CLAUSE IN EVENT OF UNCONSTITUTIONALITY.

SEC. 32. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Approved, May 26, 1924.

No. 769

In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1924

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, DER HING FONG, WONG BEN JUNG, HONG CHOW JUNG, MOK LING PARK, NG SHEE and WONG SHEE, On Habeas Corpus,

Appellants and Petitioners,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee and Respondent.

CERTIFICATION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

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Statement of Facts

This action came to the Circuit Court of Appeals for the Ninth Circuit upon appeal from the judg-

ment of the United States District Court for the Northern District of California, Southern Division thereof, Second Division, in favor of John D. Nagle, Commissioner of Immigration for the Port of San Francisco, respondent in the District Court, and against Cheung Sum Shee, Cheung Wai Mun, Fong Goon Hong, Der Hing Fong, Wong Ben Jung, Hong Chow Jung, Mok Ling Park, Ng Shee and Wong Shee, the petitioners in the District Court and the appellants before the Court of Appeals for the Ninth Circuit.

The action was to relieve the petitioners of the restraint imposed by the appellee. The petition for habeas corpus alleges that the appellants arrived at the Port of San Francisco on the steamship President Lincoln on July 11, 1924, and sought the right of permanent admission into the United States, they being respectively the wives or minor children of resident Chinese merchants lawfully domiciled within the United States, as in each instance specifically set forth in the petition. They were awaiting a setting of their cases for trial by the Commissioner of Immigration, and had the necessary witnesses all in readiness to appear for examination to establish their right of admission into the United States, under the terms of the treaties between the United States and China, and the Chinese Exclusion and Restriction Acts. The Commissioner did not accord the contemplated hearing, but caused each applicant to be examined in

his own or her own case before a Board of Special Inquiry, which thereupon denied each of them admission into the United States under the provisions of the Immigration Act of 1924 effective July 1, 1924. An appeal was at once taken to the Secretary of Labor, where suitable protests and briefs were filed, after which the Secretary of Labor dismissed the appeal in each instance and affirmed the excluding decision. The excluding decisions were substantially the same in each instance, and by way of illustration that of Cheung Sum Shee and her infant son Cheung Wai Mun is cited, the ground for the Secretary's ruling being as follows:

> "Neither the mercantile status of the husband and father, nor the applicant's relation to him, has been investigated for the reason that even if it were conceded that both these elements exist the applicants would be inadmissible as a matter of law. This is made necessary because of the inhibition against their coming to the United States as found in paragraph (c) of section 13 and that portion of section 5 which reads as follows: 'An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.'"

The petition alleges that there has been a misconstruction and a mistaken and wrongful interpretation of the Immigration Act of 1924, the effect of which

has been to violate the rights of appellants as specifically recognized by the act itself, and said incorrect statutory construction violates and disregards the lawful rights of petitioners and their respective husbands and fathers. The petition was supplementally amended by filing the original immigration records in the case of each of the detained, and as so amended the appellee interposed a general demurrer, which was sustained by the lower court on October 25, 1924, which thereupon refused to issue the writ of habeas corpus, as prayed for, and denied the petition, after which the case was immediately appealed and docketed in the Court of Appeals for the Ninth Circuit.

The same legal propositions upon behalf of other such applicants for admission were presented before the United States District Court for the Western District of Washington at Seattle, which were decided favorably to the petitioners upon September 23, 1924: In re *Goon Dip* et al. on habeas corpus, 1 Fed. (2) 811.

Later in the case of *Chin Hem Shu* (December 11, 1924), Judge Lowell of Massachusetts decided: "I don't think this new law overrules the law that the merchants and their families can enter, and I shall follow Judge Neterer on that." The case was that of a merchant's minor son.

The Certified Question

Therefore the Circuit Court of Appeals for the Ninth Circuit certified the following question to the Supreme Court of the United States:

"Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

As will be perceived even in the event of an answer favorable to the petitioners the questions of mercantile status and relationship remain to be passed upon by the lower court.

General Preliminary Observations

The status of the Chinese in America may here be properly adverted to as a means of calling the attention of this Honorable Court in a general way to certain facts.

When the civilized nations of the world awoke China from her centuries of isolation with a request that she enter into commercial intercourse with the nations of what was to her, the outside world, she complied, and in 1844 freely granted to the United States such a treaty. One of the first rights granted (Article III) to our *citizens* was *to reside with their families and trade there,* referring to the first five open

ports of China, and in the treaty of 1858 (Article XIV) the right *to reside with their families and trade there* was extended to all subsequently opened ports and to all other ports and places in China when and as they may be opened to commerce and residence. These stipulations were all one way because up to then the Chinese people had not traveled abroad. In the Burlingame Treaty of 1868 Article II safeguards the previously granted right to our citizens *to reside with their families and trade there,* and by Article VI the rights of American citizens *visiting or residing in China* were enlarged as to *travel or residence* by the favored nation clause, *and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence,* and then followed the favored nation clause. Chinese came to our shores in response to treaty invitations (Article V) and engaged in trade and commerce, and in completing our transcontinental railways, in developing our mines and in various ways hastened and materially advanced the development of our western country; some brought their families with them, others sent for them later. Financial depression sweeping over the country finally came to the western slope and competition and rivalry commenced which resulted in the treaty of 1880 by which China consented to the stopping by statute of the immigration of Chinese labor. Article I provided: *"The limitation or suspension*

shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." Article II provided: *"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, shall be allowed to go and come of their own free will and accord."* Then followed the favored nation clause, while Article III extended this clause to the Chinese *either permanently or temporarily residing in the territory of the United States.*

We have shown that the United States, one of the leading civilized and Christianized nations in the world, asked the right of its citizens to reside with their families in China and trade there, and this was granted in specific terms by China, a non-Christian nation, and reciprocally, without enumeration, the same rights were given to Chinese citizens coming to, or residing within, the United States. This was solely modified to prevent the coming of Chinese labor. Could it be possible, bearing in mind the unity of the family, identity of person and domicile, between husband and wife, parents and children, that the right of a Chinese merchant to reside with his family in this country was withheld by treaty through want of specific reiteration?

We will show hereafter that when this matter was presented to the court and finally to the Supreme Court, it was held that the treaty rights of the Chinese

were not restricted or encroached upon; that the right of merchants to reside here with their families—i. e., their wives and minor children—was upheld, and that treaty interpretation has been undisputed and upheld until the beginning of the present controversy. The right of entry and residence of Chinese within the United States rests upon treaties and the statutes in furtherance of said treaty stipulations. The General Immigration Laws in specific terms were not to repeal, alter or amend the Chinese Exclusion Laws. The effectiveness of the Chinese Exclusion Laws is amply demonstrated by the census reports, as the following will show:

POPULATION OF CHINESE PERSONS

According to the United States Census Returns for 1890 to 1920, inclusive, as referring to San Francisco, California, and the United States.

Year	San Francisco	California	United States
1890	25,833	72,472	107,475
1900	13,954	45,753	89,863
1910	10,582	36,248	71,531
1920	7,744	28,812	61,639

That the Chinese have not constituted a live political question for many years is shown in the message of President Roosevelt of December 5, 1905 (Abridgement, 1905, Vol. I, pages 46-47):

> "The questions arising in connection with Chinese immigration stand by themselves. * * * At present their entrance is prohibited by laws amply

adequate to accomplish this purpose. These laws have been, are being, and will be, thoroughly enforced. The violations of them are so few in number as to be infinitesimal and can be entirely disregarded. There is no serious proposal to alter the immigration law as regards the Chinese laborer, skilled or unskilled, and there is no excuse for any man feeling or affecting to feel the slightest alarm on the subject. * * * As a people we have talked much of the open door in China, and we expect, and quite rightly intend to insist upon, justice being shown us by the Chinese. But we can not expect to receive equity unless we do equity. We can not ask the Chinese to do to us what we are unwilling to do to them."

The quota laws of 1921-1922 were devised to stop inundation by post-war European immigration. The Chinese, whose admission was regulated by treaty, were exempt from its operation. The new quota law of 1924 likewise exempts those coming for purposes of trade under existing treaties of commerce and navigation. All the treaties with China are conceded to be of that character. The committee in presenting this law stated that this phrase was broad enough to take care of all the clauses of all of our immigration treaties. In view of this fact it was believed by the Chinese that they were completely exempted from the present quota act, as indeed they had been from the earlier act, it being borne in mind that the present legislation in this regard was but in execution of prior existing treaty stipulations.

The denial by the immigration authorities of the

right of these wives and minor children to enter the United States comes as a shock to the sensibilities of enlightened and Christian people no less than to the Chinese residents of this country, and the parties to this suit. The foundation of all Christian society and civilization is respect for the unity of family, identity of person and domicile, of husband and wife, parents and children. The fact that one of the leading civilized and Christian nations should be put in the light of entering such a decree against harmless, useful and law-abiding men, women and children shocks our sensibilities, and a decree that violates the rights which a pagan nation gave to our citizens to reside with their families in China is most repellant to our conscience, and violative in the highest and most extreme sense of solemn treaty rights long acknowledged and upheld without harmful result to our country; and this, in spite of the fact that the statute in question professes but to execute these existing treaty stipulations, and it, therefore, seems that the executive decree in these cases is based upon an incorrect construction of this act, the effect of which is to infringe the treaty and statutory rights specifically recognized by the act itself. The contention which we make has been upheld by District Judge Neterer of Seattle and District Judge Lowell of Boston, and has been denied alone by District Judge Kerrigan of San Francisco in these cases, 2 F. (2d) 995.

The Issue

Stated in a few words the issue in this case is whether or not, now that the Immigration Act of 1924 is in effect, the wives and minor children of Chinese merchants domiciled in the United States are to be allowed entry to join husbands and fathers. If the answer be yes, the petitioners must be discharged, subject to questions indicated of status and relationship. If otherwise, then families must continue separate or the fathers must give up their business in our country and return to a country from which they have long been separated and take up life in a new way. To many the answer to the riddle is to all intents a matter of life and death.

We must, therefore, approach the study of this proposition with broad and liberal minds, not forgetful of the fact that the Chinese may readapt the familiar Shakespearean quotation to apply to themselves, thusly:

> "Hath not a Chinaman hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian? If you prick us do we not bleed?"

We are not considering *inanimate* objects, but *creatures* of flesh and blood, partakers of a common humanity with us. We do not believe without

clear proof that Congress forgot all this and with deliberation enacted a law calculated to sever the very heartstrings of men and women and little children, or to uproot with violent hands the legitimate surroundings and ambitions of a lifetime of many good men.

Treaties and Statutory Provisions Affecting Exclusion of Chinese Involved in This Case

The first treaty between the United States and China was that of 1844 of Peace, Amity and Commerce (Malloy's Treaties, Vol. 1, p. 196). Article III of this treaty gives citizens of the United States the right to frequent certain treaty ports and to reside with their families and trade there. Article XXXIV contemplates the possibility of modifications to be treated of amicably at the expiration of twelve years from the date of the convention. It will be noted, therefore, that this treaty was one of commerce, and the following one was like it in this respect.

The next was that of 1858, entered into for the same purposes, and which we may pass over (Malloy's Treaties, Vol. 1, p. 211).

The treaty following was what is known as the Burlingame Treaty of 1868 (Malloy's Treaties, Vol. 1, p. 234). This treaty is to be treated as if it were in effect a continuation of the Treaty of 1858, for in the first paragraph it speaks of "circumstances" that "have arisen showing the necessity of additional arti-

cles thereto." We quote first from Article V the following:

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade or as permanent residents." * * *
>
> "Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

Then came the treaty of 1880 (Malloy's Treaties, Vol. 1, p. 237), the parts essential to this discussion being as follows:

> "Article I. Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China

agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

In 1894, came the Convention Regulating Chinese Immigration (Malloy's Treaties, Vol. 1, p. 241). From this we quote as pertinent:

"And whereas the two Governments desire to co-operate in prohibiting such immigration, and to strengthen in other ways the bonds of friendship between the two countries: * * *

Article I. "The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited. * * *

Article III. "The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart."

In 1903 the United States entered into a "Treaty as to Commercial Relations" (Malloy's Treaties, Vol. 1, p. 261). We quote:

"The United States of America and His Majesty the Emperor of China, being animated by an earnest desire to extend further the commercial relations between them * * * whereby the Chinese Government agreed to negotiate the amendments deemed necessary by the foreign Governments to the treaties of commerce and navigation and other subjects concerning commercial relations, with the object of facilitating them," * * *

Article XVII. "It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January A. D. 1900, are continued in full force and effect except in so far as they are modified by the present Treaty or other treaties to which the United States is a party.

The present Treaty shall remain in force for a period of ten years beginning with the date of the exchange of ratifications and until a revision is effected as hereinafter provided."

These treaties serve to fix the rights of merchants and laborers coming to and residing in the United States except in so far as affected by legislation within the United States. We have referred to the treaties between the United States and China thus extensively for the purpose of showing how thoroughly and repeatedly the right of Chinese merchants to enter this country had been recognized by the treaty making branch of our Government. First the right of Americans to reside in certain Chinese ports was granted, followed by the Burlingame treaty putting Chinese merchants upon a reciprocal footing, and this in nowise affected by the Treaty of 1880. (See opinion of Justice Field in *Low Yam Chow*, 13 Fed. 605, and Justice McKenna in re *Lee Kan* vs. *United States* in 62 Fed. 914, approved by the Supreme Court in *Lau Ow Bew*, 144 U. S. 47.)

The pertinent legislation which may be regarded as having any force we now include. By the Act of May 6, 1882 (22 Stat. L., 58), as amended and added to by the Act of July 5, 1884 (23 Stat. L., 115) it is provided that:

> "Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this Act, and until the expiration of ten

years next after the passage of this Act, the coming of Chinese laborers to the United States be, and the same is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States." * * *

Sec. 6. "That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate, shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.

"If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant,' hucksters, peddlers, or those engaged in taking, drying,

or otherwise preserving shell or other fish for home consumption or exportation.

"Sec. 13. That this act shall not apply to diplomatic and other officers of the Chinese or other Governments traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons. * * * *

"Sec. 14. That hereafter no State court or courts of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

The Act of September 13, 1888 (25 Stat. L., 476), relating particularly to Chinese laborers, contains in Section 7 this provision:

"Sec. 8. That the Secretary of Labor shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles."

By the Act of May 5, 1892 (27 Stat. L., 25), it was provided that:

"All laws now in force prohibiting and regulating the coming into this country of Chinese

persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act."

By the Act of November 3, 1893 (28 Stat. L., 7), it was provided in Section 2 as follows:

"The term 'merchant', as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

By the Act of April 29, 1902 (32 Stat. L., part 1, 176), as amended and re-enacted by Section 5 of the Deficiency Act of April 27, 1904 (33 Stat. L., 394-428), it is provided as follows:

"All laws in force on the twenty-ninth day of April, one thousand nine hundred and two, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the act entitled 'An act to prohibit the coming of Chinese laborers into the United States,' approved September thirteenth, one thousand eight hundred and eighty-eight, be, and the same are hereby, re-enacted, extended, and continued, without modification, limitation, or condition." * * *

Some of the foregoing references are given because

it will be necessary to refer to them in argument and not because of direct application to the questions involved in this case.

The Immigration Acts

Under this heading the first Act to which it becomes necessary for us to call attention is that regulating immigration of aliens to, and the residence of aliens in, the United States (February 5, 1917; 39 Stat. L., 874).

In Section 3 are enumerated the classes of aliens, specially referring among others to Asiatics, which shall be excluded from admission to the United States and providing among other things that "no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States."

It is added:

> "The provision next foregoing, however, shall not apply to persons of the following status or occupations: Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travellers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States." * * *

In Section 38 it is provided:

> "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons

of Chinese descent, except as provided in section nineteen hereof." (Section 19, referred to, does not affect questions involved in this case.)

The subject matter contained in this Section 38 was considered by this Court in the cases of *U. S.* vs. *Woo Jan* (245 U. S., 552; 38 Sup. Ct., 207; 62 L. Ed., 466), *White* vs. *Chin Fong* (253 U. S., 113; 40 Sup Ct., 449), and in *Ng Fung Ho et al.* vs. *White* (259 U. S., 276, 279; 42 Sup. Ct., 492, 493).

There followed the "Quota-Act" affecting immigration, approved May 19, 1921 (42 Stat. L., 7), as amended May 11, 1922 (42 Stat. L., 540), containing nothing, however, directly affecting the questions involved in this case, except that it provides in Section 4 that its provisions are in addition to and not in substitution for the provisions of the immigration law. It is important to observe, however, that this quota law in Section 2, Subdivision 5, exempts from its operation "aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration." The Chinese were exempted because their coming was regulated by treaty; the agreements had reference to the so-called Gentlemen's Agreement with the Japanese.

We come now to the Immigration Act of 1924, approved May 26, 1924, being Public Law No. 139 of the Sixty-eighth Congress, and for convenience at this point we include all pertinent sections as follows:

"Definition of 'Immigrant'

"Sec. 3. When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Non-Quota Immigrants

"Sec. 4. When used in this Act the term 'non-quota immigrant' means,

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South

America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him.

(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or

(e) An immigrant who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn."

"Quota Immigrants

"Sec. 5. When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

"Preferences Within Quotas

"Sec. 6. (a) In the issuance of immigration visas to quota immigrants preference shall be given—

(1) To a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife, of a citizen of the United States who is 21 years of age or over;" * * *

"Non-Quota Immigration Visas

"Sec. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant."

"Exclusion From United States

"Sec. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be

admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3.

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such admissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

(e) No quota immigrant shall be admitted under subdivision (d) if the entire number of immigration visas which may be issued to quota immigrants of the same nationality for the fiscal year has already been issued. If such entire number of immigration visas has not been issued, then the Secretary of State, upon the admission of a quota immigrant under subdivision (d), shall reduce by one the number of immigration visas which may be issued to quota immigrants of the same nationality during the fiscal year in which such immigrant is admitted; but if the Secretary of State finds that it will not be practicable to make such reduction before the end of such fiscal year, then such immigrant shall not be admitted.

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16."

"Maintenance of Exempt Status.

"Sec. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section (3), or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

"Act to Be In Addition to Immigration Laws.

"Sec. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

"General Definitions.

"Sec. 28. As used in this Act, * * *

(b) The term 'alien' includes any individual not a native-born or naturalized citizen of the United States, but this definition shall not be held to include Indians of the United States not taxed, nor citizens of the islands under the jurisdiction of the United States.

(c) The term 'ineligible to citizenship,' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under Section 2169 of the Revised Statutes, or under Section 14 of the Act entitled 'An Act to execute certain treaty stipulations relating to Chinese', approved May 6, 1882, or under section 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections; * * *

(g) The term 'immigration laws' includes such Act (Act of February 5, 1917), this Act, and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, or expulsion of aliens."

Congressional Understanding as to Aliens Ineligible to Citizenship Under the Immigration Act of 1924.

As we have under consideration the question of the proper interpretation of the present act so far as Chinese are concerned, we recall the old Blackstonean maxim that in the interpretation of statutes one should bear in mind the old law, the mischief and the remedy. With this in view we can with advantage refer to the reports of the Committee on Immigration and Naturalization of the House of Representatives, the first report being No. 176, Sixty-eighth Congress, First Session. This covers the first House Bill in which a number of changes were afterwards made with the result that it was largely recast, but, nevertheless, is pertinent to our discussion upon the points in issue.

After reciting the necessity for immediate and urgent need of immigration legislation by reason of the fact that the Act of 1921, known as "The Three Percent Law," was about to expire, and there was fear, in the absence of further legislation, that a movement to our shores of the largest immigration of peoples in the history of the world, might be expected to begin July 1, 1924, and that the exclusion clauses of the Act of February, 1917, would be powerless to stem the tide, a bill was prepared which, among other things, preserved the basic immigration act of 1917, changed the quota base of the Act of 1921 from the census of 1910 to the census of 1890, reducing the

percentage from 3 to 2, and met "the situation with reference to the admission of persons ineligible to citizenship." The report under the heading of "Persons Ineligible to Citizenship" contains the following:

> "The provisions of the bill in reference to the admission and non-admission of 'persons ineligible to citizenship' are as follows:
>
> (b) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (g) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

The subdivisions referred to are as follows:

> "(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> (d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university.
>
> (g) An immigrant who is a bona fide student over 18 years of age and who seeks to enter the United States solely for the purpose of study at an accredited college, academy, seminary, or university, particularly designated by him and approved by the Secretary."

The report on page 14 continues:

> "The commercial treaty between the United States and Japan of 1911 supersedes the treaty of 1894, and contains the following provisions:
>
> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential purposes and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The report refers to the fact that nationals of Oriental countries are not entitled to be naturalized and, without any reference whatever to the Chinese situation, further discusses the commercial treaty between the United States and Japan of 1911, and the so-called "Gentlemen's Agreement."

It is thus noted that Chinese were not specifically mentioned or discussed in the preparation of this report or of the bill to which it relates, nor does there seem, at this point, to have been any intention on the part of the committee that any provision touching Chinese exclusion should be enacted, the difficulty in regard to Japan being the only matter under discussion.

Later, the first bill (H. R. No. 6540) was reintroduced with amendments largely because of suggestions

coming from the Secretary of State, the reintroduced bill being known as H. R. No. 7995; the report accompanying it being No. 350.

The purposes of the bill were stated essentially as on the former occasion, the immigration law of 1917 again treated as the basic immigration law, and the reasons for immediate action were stated in practically identical language. Pursuant to the suggestion of Secretary Hughes, however, "for the protection of treaties of the United States with other countries," the following additional exemption clause was added to Section 3:

> "(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Commenting upon this it was said that

> "Your committee feels that this additional exemption does not pass that control (over immigration) from Congress, and feels also that it is broad enough to take care of all the clauses of all our commercial treaties, including that with Japan, which has been specifically mentioned in the exchange of letters between the State Department and the Committee."

The committee reported at some length the provisions of the Treaty of Commerce and Navigation between the United States and Japan concluded in 1911 and the so-called "Gentlemen's Agreement," and

again and in like language considers who may not be naturalized and assumes that (page 6 of Report)

> "The modifications now made in the bill will remove the Secretary's objections, which were apparently founded on the fact that Bill H. R. 6540 omitted to make exception for those coming solely for trade purposes."

It states that

> "As a matter of fact, the Department of State advises that no immigration treaties have been made by the United States since those made with China in 1880 and 1894, the latter of which was terminated in 1904."

Thereafter the Report discusses at great length the relations between Japan and the United States including the rapid increase of Japanese in the United States, notwithstanding the "Gentlemen's Agreement," and states that (Report, p. 9)

> "It would appear from these facts that the United States has been grossly lax in permitting the increase in her territory of an unassimilable population ineligible for citizenship, and that she has deferred too long the adoption of remedial measures."

At no point is the suggestion made that it is desirable or intended to change the Chinese exclusion laws. The nearest approach is on page 6 of the Report, where it is said that

> "All must agree that nothing can be gained by permitting to be built up in the United States colo-

nies of those who cannot under the law become naturalized citizens, and must therefore owe allegiance to another government."

Of course, it could scarcely be contended that this remark could have reference to Chinese merchants and their families.

It seems clear from this review that notwithstanding the general language of the bill, and notwithstanding references in it to aliens ineligible to citizenship and unassimilable, the purpose in the Committee's mind was to put an end to the coming of the Japanese, and this purpose was so determined that in the beginning no saving clause whatever was inserted, and the saving clause finally placed in the bill was only put there to enable Japanese in business, particularly provided for in the Treaty of 1911, to come under the barriers which had been erected against their national associates.

Judicial Construction and Interpretation of Chinese Immigration Laws

With this condition as to the treaties and laws governing the right to entry into the United States of Chinese merchants, their wives and children, and evidence of Congressional intent, extending only to others than Chinese, the Department of Labor has excluded from such entry in this case the wives and children of Chinese merchants residing in the United

States and who have appeared at our ports of entry since July 1, 1924.

It will be noted that by treaty and by law only Chinese merchants (not expressly including their wives and children) were entitled to admission in express terms until recognition of the right of wives and children in Section 3 of the Immigration Act of 1917, and that entry was refused by the Department of Labor in these cases when the subject matter first received special treatment. Yet up to the present time their right to admission has not been successfully challenged. Although not enumerated, the right of admission as having the status of the merchant himself has been continuously recognized since the decision of Judge Deady *in re Chung Toy Ho,* 42 Federal, 398. He refers to the passage of the Act of 1884, professedly to execute the Treaty of 1880, permitting a Chinese merchant to bring his body and household servants into the country where they shall "be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens of the most favored nation," and continues:

> "Chinese women are not teachers, students, or merchants; and therefore they cannot, as such, obtain the certificate necessary to show they belong to the favored class. But, as the wives and children of 'teachers, students and merchants,' they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact. * * *
>
> "It is impossible to believe that parties to this

treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children, particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn into the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

In the case of the *United States* vs. *Gue Lim,* 83 Federal, 136, Hanford, District Judge, held that

"Looking now to the reasons for and against the rule contended for by the officers of the government, I agree with Judge Deady that the admission of Chinese merchants with their families is not to be regarded as a mischief which the Chinese restriction and exclusion acts were intended to remedy."

The latter case was appealed to the Supreme Court of the United States (176 U. S., 459; 44 Law. Ed., 544) and in the course of its opinion the Supreme Court said:

"The question is, what did Congress mean by the Act of 1884? Some light upon that question can be derived from the treaty of 1880, which must be read in connection with it. By Article II of the treaty,

Chinese subjects proceeding to the United States, either as teachers, students, merchants, or from curiosity, together with their body and household servants, were to be allowed to go and come of their own free will and accord, and were to be 'accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.'

"It was for this purpose of carrying these treaty stipulations into effect that the Act of 1882 (22 Stat. L., 58, Chap. 126), and the amended act of 1884 (23 Stat. L., 115, Chap. 220) were passed."

"It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty; * * * The act was never meant to establish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly and reasonably construed, it does not do so. If we hold that she is entitled to come in as the wife, because the true construction of the treaty and act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife. In the case of the minor children the same result must follow as in that of the wife."

A most illuminating comment upon the decision in the *Gue Lim* case is made by Mr. Justice McReynolds, speaking for the court in *Yee Won* vs. *White,* 256 U. S., 399, wherein he says that the *Gue Lim* case turned on the true meaning of section 6 of the Act of July 5, 1884, as to requirement of certificate as to mer-

cantile character, and his conclusion was "that the section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880, to permit merchants freely to come and go."

Equally an interpretation which would exclude the wives of all tourists or persons (aliens) visiting the United States for business or pleasure or entering for trade under an existing treaty of commerce and navigation, at any rate unless within a quota, is certainly, we submit, to be avoided.

The Court of Appeals for the Ninth Circuit, in *Tsoi Sim* vs. *U. S.* (116 Fed., 920), decided on May 5, 1902, following the Gue Lim decision, states in part:

> "These cases recognize the principle that the domicile of the parent is the domicile of the child and that the status of the wife is fixed by the status of the husband. That the domicile of the husband is the domicile of the wife is well settled; it was so expressly held in *Anderson* vs. *Watt*, 138 U. S., pp. 694, 706; 11 Supreme Ct., 449; 34 Law. Ed., 1078."

Should Broad or Narrow Construction Be Given to Recent Legislation?

Approaching the consideration of the true construction to be given to the law as laid down by Congress, we have a right to inquire broadly what has been the interpretation of the laws governing Chinese immigration when they have been called into question in

the courts. We are justified in doing this because Congress in passing its legislation had a right to expect, in the absence of express direction on its part to the contrary, that the court would approach the study of the new law from the general standpoint which had prevailed before the recent enactments. We can, as it happens, confidently assert that the legal approach has been in favor of the broad rather than the narrow treatment of the whole subject.

Let us enumerate some of the classes of cases in which the attitude of the courts has been entirely manifest:

1. In the case of *Tsoi Sim* vs. *U. S.,* 116 Federal, 920, the Circuit Court of Appeals refused to expel from this country a Chinese woman who had failed to register during the registration period under the Chinese Exclusion Act of 1923, and who, after the expiration of the legal period, had married an American citizen. The Court held that it would be unreasonable, unjust and oppressive to give the statute literal application. There was no clause of the Exclusion Act specifically preventing the deportation of this Chinese woman who had failed to register as she did not belong to what is known as the "exempt classes."

2. In the case of *Lau Ow Bew* vs. *U. S.,* 144 U. S., 47, the Supreme Court permitted re-entry into this country of a Chinese merchant who had been

residing and carrying on business here and who had gone abroad for a temporary visit. This, although the Act of 1884 (23 Stat. L., 115) had specifically provided that "every Chinese person, other than a laborer * * * who shall be about to come to the United States," must obtain a specially described certificate from the Chinese government and that the certificate in question should be the "sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." The Court in declining under such circumstances to consider the certificate a requisite in the case of the merchant established in this country, said:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd construction."

It held, therefore, that such Chinaman should be readmitted upon the basis of evidence showing that he had previously lived here and without producing the certificate specified by said section as required of "every Chinese person other than a laborer."

3. Section 2 of the Chinese Exclusion Act of November 3, 1893 (28 Stat. L., 7) provided in terms that a merchant for the purposes of the exclusion laws must be "a person engaged in the buying and selling of merchandise at a fixed place of business, which business is conducted in his name," but the lower

court and finally the Supreme Court of the United States held that it was not necessary for the merchant to conduct the business in his own name, but merely that his name shall appear in the partnership certificate and that he must have a real interest in the business; that it would be unreasonable in the light of history and the purposes of the legislation, notwithstanding the apparently plain language of the statute, to impute to Congress the intention to change the usual Chinese custom of doing business under a firm designation, especially as the purposes of the law could not be furthered by so doing (*Lee Kan* vs. *U. S.*, 62 Fed., 914; *Tom Hong* vs. *U. S.*, 193 U. S., 517).

4. We have already alluded to the cases of *Chung Toy Ho*, 42 Fed., 398, and *Gue Lim* vs. *U. S.*, 176 U. S., 459, showing that although not at all included as specified under the treaty or law, the wives and children of merchants were entitled to admission to the United States.

5. A rule of liberal interpretation to carry out the intent rather than the naked letter of Congressional enactment has repeatedly been shown as to the general immigration acts. Without elaboration we refer to

Church of the Holy Trinity vs. *United States*, 143 U. S., 457, wherein the court held that it was unreasonable to suppose, considering the object of the Contract Labor Law, that a minister was to be held excluded.

United States vs. *Gay,* 95 Fed., 226, the Circuit Court of Appeals holding a window dresser imported under contract was not a contract laborer.

Scharrenberg vs. *Dollar Steamship Co.,* 229 Fed., 970, affirmed by the Supreme Court, 245 U. S., 122, holding a seaman engaged in foreign trade was not a contract laborer.

Tatsukichi Kuwabara vs. *United States,* 260 Fed., 104, holding that a Japanese teacher was not a contract laborer.

United States vs. *Union Bank of Canada,* and *United States* vs. *Royal Dutch West India Mail Co.,* 262 Fed., 91, adding into the meaning of the law a bank bookkeeper and a steamship office clerk.

Ex parte Aird, 276 Fed., 954, holding draftsman as a marine engineer was admissible, and not a contract laborer.

Ex parte Gouthro, 296 Fed., 506, holding a telegraph operator not within the Congressional meaning as a contract laborer.

After this enumeration of specific cases, let us cite the broad rule laid down by this court in *United States* vs. *Kirby,* 7 Wall, 482, 486:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended excep-

tions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Interpretation of Section 25.

It is, of course, a well known principle of statutory construction that in the presence of contradictory or dubious expressions of the legislative will, an effort shall be made to harmonize and give effect to all provisions of the law. With this in mind let us look at Section 25 of the Immigration Act of 1924:

> "The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

If we say that this Act is in addition to, and not in substitution for, existing immigration provisions and add, as the Act does, that "other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act," and give these expressions their proper and natural emphasis, we may arrive at a solution of the difficulty

arising later in the section, because of the direction of the second clause of its second sentence—"an alien although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

No intent is shown in this Act itself, or in the reports accompanying it, to abolish the Chinese immigration laws, and as we see by this section, the Act is expressly declared not to be in substitution for such laws. Furthermore, the Immigration Act of 1917, with its clause in relation thereto (Section 38) expressly recognized the Chinese exclusion laws and continued their existence.

All of the Act, we say, must be given, if possible, meaning and effect, and if it be considered that the "addition" it gives to the immigration laws as to aliens incapable of naturalization in Section 13 refers to Asiatics other than Chinese—the laws as to the latter of whom are subjected to no substitution—then there is a new class to whom the workings of the Act may at this point be considered as dedicated, that is to say, all aliens incapable of naturalization except those who are expressly provided for by the laws governing the immigration of Chinese or coming from the limits of the Asiatic barred zone. This interpretation would accord with the facts of the situation, particularly the new and pressing form of the Asiatic problem and the intent of the committee to meet it. This general

view, furthermore, would permit the English traveler for business or pleasure to enter with his family irrespective of any question as to quota, for he would receive the benefit of the Gue Lim decision, of which the Department would logically be compelled to deprive him if the wives of Chinese merchants were rejected.

The foregoing argument would give to the second sentence of Section 25 all the force to which it is entitled.

Section 13 would be allowed its full force, but not interpreted as a substitute for, or a repeal of, the Chinese immigration laws. Section 14 as to deportation and exclusion and as to maintenance of exempt status would be effective and could be carried out.

Furthermore, the Asiatic barred zone provided for by the Immigration Act of 1917 would remain in force, and between the Chinese Exclusion Acts, the barred zone provision and the provisions of the Act of 1924 as to remaining Asiatics, all persons ineligible to naturalization and barred out, save for treaty provisions or other special exceptions, would be provided against.

The Effect of Clause (6) in Section 3 Relative to Admission of Aliens to Carry on Trade.

Section 3 provides:

> "When used in this Act the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily for business or pleasure * * * and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance to the provisions of a present existing treaty of Commerce and Navigation."

It seems to be the view of the government, as shown by what has happened in this case, that the Chinese Exclusion Acts are in effect superseded by the Immigration Act of 1924 and that the only aliens entitled to enter the United States, as far as this discussion is concerned, are those who come solely to carry on trade under the treaty and that as to these latter, their wives and minor children may not be admitted because this particular clause is not referred to later; only clause (d) in section 4 being mentioned; such clause (d) referring to ministers, professors and their wives and unmarried children.

It will be borne in mind that clause (6) in Section 3 was not originally in the Act, but was put in at the suggestion of Secretary Hughes and that the insertion was not completed in Section 13 as it should have been to carry out in the most meticulous detail the proper intent of the framers of the Act.

While we discuss this condition it is not, from our point of view, at all essential to our argument. Nevertheless, a situation arises hereunder which proves to our minds that the government interpretation is untenable.

We need not repeat the argument that under the Chinese Exclusion Acts without any especial mention of them, the wives and minor children of merchants have been found admissible, and precisely as that was done under the sanction of the Supreme Court, we have a right to argue that an alien entering this country to carry on trade is entitled under all circumstances to bring with him his wife and minor children —in other words, that Section 3 should, ~~if it were applicable~~, be interpreted in favor of the wife and children precisely as the Chinese immigration laws have been interpreted for more than twenty years. Applying this interpretation and assuming argumentatively, as we have a right to argue, if the clause is interpreted precisely as the old laws were interpreted, a wife and children have the right to admission.

But to accept the interpretation the Department of Labor gives to this section leads to a social and legal absurdity, for it will be noted that by its terms an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, is a non-immigrant and entitled to come in irrespective of any question of quota. By the departmental interpretation, a wife or child of such a traveler would be com-

pelled to be regarded as a quota immigrant, or she or it would be treated under Section 5 as an immigrant who is not a non-quota immigrant. Let us assume, therefore, that the quota of England has been exhausted when an Englishman visiting the United States with his family arrived in New York. If an alien entitled to enter the United States to carry on trade under clause (6) may not bring with him his wife and minor children, then under the circumstances indicated, a tourist, the quota of his country being exhausted, may not bring with him his wife and children. No possible distinction can be made in the interpretation of the two clauses. The exclusion, therefore, of the wife and children demanded in this case would mean that the wife and children of the tourist or business man coming from England, the quota being exhausted, must be stopped and turned back at the port of entry. The Quota Act of 1921, as amended in 1922, would not admit the Englishman's family, for as to travelers on business or pleasure no mention is made of wives or children. Again the Immigration Act of 1924 is silent on the subject. In practical application no doubt has been expressed on this point as to the Englishman's family, nor should any doubt be now expressed under like circumstances as to either English or Chinese merchants or their families. Let us suppose that the wealthiest man in China desiring to enter the United States with his family for self-instruction should present himself at the Port of San

Francisco as a visitor for pleasure or as a tourist, he might be admitted by the Department as a visitor under clause (2) of Section 3, but there being no such quota in his case as might sometime help the Englishman, the family would be refused admission. Could such an interpretation contribute to the amenities which should prevail between nations? But is it not inescapable if the department be right as to clause (6)?

Not alone would this interpretation be inconsistent with the interpretation heretofore given with regard to merchants' wives and children, but it would go much further and render invalid the coming into this country in times past of even the wives and children of the Chinese ministers to the United States. In this connection we call the court's attention to the fact that the Act of 1882, as amended and added to by the Act of July 5, 1884, touching the immigration of Chinese said, in Section 13, that it should not apply to diplomatic or other officers of the Chinese, or other governments, traveling upon the business of their government "whose credentials should be taken as equivalent to the certificate in this Act mentioned, and should exempt them and their body and household servants from the provisions of this Act as to other Chinese persons."

Section 7 of the Act of September 13, 1888, gives a general right of admission only to "Chinese diplo-

matic or consular officers and their attendants," not to wives and children, and this law is now in existence.

Even the Treaty of 1894, referring to

> "The right at present enjoyed by Chinese subjects, being officers, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein,"

never in express terms extended such right to their wives or children; nevertheless they came in without question.

To give, therefore, the interpretation to this Act demanded by the Department of Labor, we must confess that the Supreme Court was wrong in its Gue Lim decision so frequently cited with approval, that the Department of Labor was wrong in admitting the wives of Chinese officials and travelers, and that under the circumstances stated it would be wrong to admit the wives and children of Englishmen or Frenchmen coming to this country or of a wealthy Chinese traveler seeking self-instruction, and we insist upon this, notwithstanding the language of Section 5, as follows:

> "When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so

specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

It is manifest that if the Chinese merchant's wife is not to be admitted because of the provision against admission through relationship in Section 5, so also the wife of the English traveler must stay out, unless she be admitted under the quota. She has no express non-quota provision to help her.

What Was the Effect of the Immigration Act of 1924 on the Chinese Immigration Laws?

It will be remembered that the Act of 1917 provided in Section 38:

"That this Act shall not be construed to repeal, alter, or amend, existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section nineteen hereof." (Section 19 refers to matters not involved in this case.)

Also that the Act of 1921-1922 provides in Section 2 as follows:

"* * * This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: * * * (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration;" * * *

There being nothing of material character in the Acts of 1917, 1921 and 1922 directly planned to affect the Chinese, it is evident, therefore, that at the time of the enactment of the Immigration Act of 1924, the Chinese Immigration Laws were in full force and effect, and the question arises as to whether they can be treated as abrogated by anything contained in the latter Act. When Congress was afforded the opportunity to set them aside altogether, particularly when it came to define the term, "Immigration Laws," in paragraph (g) of Section 38, it described as including "such Act (the Immigration Act of 1917), this Act and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, and expulsion of aliens." We should not now forget that the Act of 1917 expressly continued the Chinese Exclusion Act.

It is true, as we have pointed out, that in Section 25 of the Act of 1924 it is said that:

> "An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

It is also true that, under paragraph (c) of Section 13 no alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admis-

sible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of Section 4, or (2) is an unmarried child under eighteen years of an immigrant admissible under such subdivision (d) and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3. It will be recalled that these clauses are left as reported in the original bill before the provision relative to traders was inserted as clause (6) in section 3, and by apparent inadvertence no express addition was made to Section 4. We are, therefore, by the government's contention, left in the position of admitting alien wives (ineligible to citizenship) of ministers (perhaps of the Buddhist religion) and professors with their wives and not wives of merchants. Assuredly, Congress had no such intent.

To give these sections the effect sought for by the government would be to repeal by implication the whole body of Chinese immigration laws recognized as in existence by Section 38 of the Act of 1917 and also recognized by paragraph (g) of Section 38, above quoted. Merchants' wives and minor children would not be provided for as under prior legislation. Provisions as to return of laborers would be defeated or limited by the provisions of the new Act.

We have to submit, therefore, that repeals by implication not being favored in the law, no intendment to support them should be indulged in in the absence of clear statutory direction.

Touching the question of repeals by implication which are never favored, we refer without particular elaboration to a few cases:

"The implication of a repeal of one ordinance by another * * * is never favored."

Mitchell vs. *Dakota Central Tel. Co.*, 246 U. S. 396.

"The amendments of Espionage Act of June 15, 1917 (40 Stat. L., 217, Chap. 30; Compiled Statutes, Sec. 10212A), did not invalidate a prosecution for acts committed before the amendment."

Frohwerk vs. *U. S.*, 249 U. S., 204; 63 Law Ed., 561.

"An important public statute of long standing will not be held to be repealed except by express words or by strong and necessary implication."

Wilson vs. *Spencer*, 1 Rand., 76; 10 Am. Decisions, 491.

Treaty Rights and Statutory Recognition Thereof

Without attempting to reiterate much that has been said before we desire, in conclusion, briefly to call attention to the fact that steps to begin treaty relations with China find expression in the Act of March, 1843, c. 90 (5 Stat. 624), wherein provision was made to enable the President to establish future commercial relations between the two countries *"on terms of national equal reciprocity."* The original treaty which

followed was that of 1844, and the supplemental or additional stipulations or articles embraced in the treaties of 1858, 1868 and 1880 were but supplemental and additional articles thereto, excepting for the sole modification as to Chinese coming to this country as laborers contained in the last mentioned treaty. The treaty which followed, that of 1894, has since been denounced by the Chinese Government. The last treaty, that of 1903, was simply a reaffirmation of the then existing treaties. The method and manner in which these treaties are to be considered is simply that the different treaty stipulations make one composite and completed treaty. President Hayes, upon this subject, and with respect to the first three of these groups of treaty stipulations, states as follows (6, Messages of Presidents, 4466):

> "* * * Upon the settled rules of interpretation applicable to such supplemental negotiations the text of the principal treaty and of these 'additional articles thereto' constitute one treaty from the conclusion of the new negotiations, in all parts of equal and concurrent force and obligation between the two governments, and to all intents and purposes as if embraced in one instrument."

This view has been, in effect, upheld by Mr. Justice Field when sitting on the circuit in the celebrated case of *"The Chinese Merchant In re Low Yam Chow"* (13 Fed., 605, 608):

> "* * *"
>
> "The Act of May 6, 1882, was framed in supposed conformity with the provisions of this sup-

plementary treaty. In the inhibitions which it imposes upon the immigration of Chinese there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that Congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese laborers. It provides, in express terms, as seen above, that the limitation or suspension shall apply only to them, *'other classes not being included in the limitations.'*"

This view was concurred in and approved by the Court of Appeals for the Ninth Circuit, the opinion being written by Circuit Judge McKenna, who afterwards succeeded to the Supreme Bench, in the case of *Lee Kan* vs. *United States* (62 Fed., 914). This holding was also quoted with approval by this Court in the case of *Lau Ow Bew* (144 U. S., 59).

These decisions are all to the effect that the provisions of the Burlingame Treaty, except as to the coming of Chinese laborers, are still in full force and effect. This Court in the case of *United States* vs. *Gue Lim* (176 U. S., 459) upheld the right of a merchant's wife and minor children to enter the United States as a treaty right, and that they were not to be denied admission under the provisions of a subsequent statutory enactment, whose sole purpose was avowedly to execute these treaty stipulations. It was not deemed necessary in that case, in support of the

plea of Chinese wives and minor children, to go back of the stipulations in the treaty of 1880, and it may not be necessary in the present controversy, but to meet the contingency if it should be necessary, we have herein specified the earlier treaty stipulations wherein the right *"to reside with their families and trade there"* is reciprocally given to merchants traveling or visiting in this country, and we submit that this right lacks none of its vitality through having been given *reciprocally* instead of by *reiteration.* These different treaty articles formed one composite and completed treaty, and as said by President Hayes are *"in all parts of equal and concurrent force and obligation between the two governments, and to all intents and purposes as if embraced in one instrument."*

Upon the subject of the interpretation of treaties the rule as later reaffirmed and announced by this Court in *Asakura* vs. *City of Seattle* (265 U. S., 332; 44 Sup. Ct., 515), said, through Mr. Justice Butler, as follows

> "* * * Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. * * *."

Statute Upholds Treaty

The Immigration Act of 1924 professes to recognize and uphold treaty rights, all as more elaborately set forth earlier in this brief. We concede that a statute may abrogate the provisions of a prior treaty, as upheld by this Court in *Chae Chan Ping* vs. *United States* (130 U. S., 581; 9 Sup. Ct., 623); but we contend that a statute which professes to recognize a treaty, or execute the treaty stipulations, should not be interpreted to abrogate treaty rights which it professes to recognize and place into effect, *Chew Heong* vs. *United States* (112 U. S., 536; 5 Sup. Ct., 255). We therefore contend that the present act should not be interpreted in a manner destructive of the very object which it claims to recognize and uphold. In the *Chew Heong* case this Court, speaking through Mr. Justice Harlan, said:

> "* * * For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said, in the case supposed, would be that there was an apparent conflict between the mere words of the statute and the treaty, and that by implication the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure.

But even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. *Ex parte Yerger,* 8 Wall., 105. In *Wood* vs. *U. S.,* 16 Pet., 362, Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say, by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto,* to the extent of the repugnancy.' In *State* vs. *Stoll,* 17 Wall., 430, the language of the court was that 'it must appear that the latter provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.' See also *Ex parte Crow Dog,* 109 U. S., 570; S. C. 3 Sup. Ct. Rep., 396; *Arthur* vs. *Homer,* 96 U. S., 140; *Harford* vs. *U. S.,* 8 Cranch, 109.

"When the act of 1882 was passed Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so

declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. * * *."

The Immigration Act of 1924, in Section 3, Subdivision 6, recognizes the right of aliens to come solely for purposes of trade under the provisions of existing treaties of commerce and navigation. Obviously the measure of the rights of the different traders is to be determined by the treaties of the nations to which they belong. That nationals of one country may be accorded more or less than the nationals of another is to be determined by their existing treaties. This act maintains the Immigration Act of 1917 as the basic law upon that subject and is, as we have earlier herein contended, to be considered in *pari materia* with it. This view, as to the relation of the Immigration Act of 1917 to the first quota act of 1921-1922, has been sustained by this Court in the recent case of *Commissioner etc.* vs. *Gottlieb* (265 U. S., 310; 44 Sup. Ct., 528), wherein, speaking through Mr. Justice Sutherland, the Court held:

"* * *.

"The lower court was right in holding that the acts are in *pari materia,* and that Section 3 of the earlier act is still fully operative, and may be considered as though it formed a part of the later act.

> "* * * The contention that it is absurd and unreasonable to say that the wives and children of ministers from the barred Asiatic zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice. That aliens from one part of the world shall be admitted according to their status, and those from another part according to fixed numerical proportions, is a matter wholly within the discretion of the lawmaking body, with which the courts have no authority to interfere."

Under this Court's interpretation Section 38 of the Immigration Act of 1917, wherein it is

> "Provided, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section 19 hereof * * *,"

is still fully operative and may be considered as though it formed a part of the present Immigration Act of 1924. The rights of the Chinese, as contended in these different Chinese Exclusion Acts, are all based upon and profess to be but interpretative of the treaty rights of the Chinese. As the Immigration Act of 1924 professedly recognizes and upholds the treaty rights in question, it is apparent, we respectfully submit, that any interpretation of this act which would deny treaty and statutory rights which it professes to recognize and uphold must be avoided as repellant

to the national consciousness of honor, integrity and fair dealing, all as differently stated by the late President Roosevelt in the following words: "* * * *we can not expect to receive equity unless we do equity. We can not ask the Chinese to do to us what we are unwilling to do to them."*

Neither Section 5, nor Section 25, profess to violate, or transgress, or encroach upon, treaty rights. Section 5 states:

> "* * * An alien who is not particularly specified in this act as a * * * non-immigrant shall not be admitted as a * * * non-immigrant because of relationship to any individual who is so specified."

But if the wives and children are particularly specified as entitled to come in the treaty, even though that specification be given *reciprocally* instead of by *reiteration,* then they are exempt from the debarring provision of Section 5, because they would be themselves particularly specified as in the act intended, and hence be non-immigrants and exempt from the debarring provision of Section 13, Subdivision (c) of the Immigration Act of 1924, which is ineligible to citizenship ban. Judge Neterer, in *Ex parte Goon Dip,* 1 F. (2d) 811, 813, 814, held as follows:

> "Section 25, Immigration Law 1924, provides: 'The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws. * * * An alien, although admissible

under the provisions of this act, shall not be admitted * * * if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act.'

" 'Immigration laws' are defined in Section 28 (g), Act, *supra,* to mean 'all laws, conventions, and treaties * * * relating to the immigration, exclusion, or expulsion of aliens.' Reference to such laws is made in the margin.

"An immigrant is 'an alien' departing from any place outside the United States destined for the United States, * * * except '* * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' The wives and minor children are clearly not immigrants under Subdivision (6), Section 3, *supra.*

" 'No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * (3) is not an immigrant as defined in section 3. Subdivision (3), Section 13, Act, *supra.* The courts have for more than a generation construed article 2 of the treaty, *supra,* to read: 'Chinese * * * merchants * * * together with their body and household servants, wives and minor children, shall be allowed to go and come * * *.'

"(3) The report of the committee and the express provisions of the act clearly show the intent of the Congress not to disturb the relations existing under the prior law and treaty. I think that this act and the treaty and 'immigration law' and prior judicial construction of the treaties and law and departmental construction must all be considered together, and under such consideration the court will be slow to assume that Congress intended to

treat the treaty stipulations as a 'scrap of paper.' *Chew Heong* vs. *U. S.*, 112 U. S., 536; 5 S. Ct., 255; 28 L. Ed., 770; *U. S.* vs. *Mrs. Gue Lim, supra.* Hence I think these aliens were denied a fair hearing.

"The writ will issue, returnable October 1. This will give opportunity to the board of special inquiry to further examine the aliens and determine their physical and mental fitness under the Immigration Law, and relationship to the respective resident alien merchants."

Since it has been conclusively shown that the avowed intention of Congress in the supplemental addition of Subdivision 6 to Section 3, was to protect treaty rights that would otherwise have been infringed upon, and it being unmistakably shown that the Chinese Exclusion Laws are not to be deemed altered, repealed or amended by this Immigration Act of 1924 there can appear no good reason why the congressional intention so manifested should be given other than its full recognition, and so considered, we have to submit that the question certified should be answered in the negative, that is to say, that the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, are not mandatorily excluded from the United States under the provisions of the Immigration Act of 1924.

SUMMARY

We may now marshal the salient points we have set up in the foregoing:

1. In considering and passing the Act of 1924, Congress had no design to touch the Chinese Immigration Acts, its attention being directed primarily to the question of a reduced quota, the correction of hardships in the administration of the old law, and the exclusion of the Japanese or Asiatics other than Chinese.

2. Congress acted in full knowledge of the fact that in the past that the courts had treated the families of merchants as belonging to the mercantile class as fully as the heads of the household.

3. As affecting human rights the courts had always taken a broad humanitarian view of the Immigration laws seeking even in the teeth of doubtful or apparently hostile language the true intent of Congress.

4. The only consistent interpretation of Section 25 of the Act of 1924 shows that the Act was in addition to and not in substitution for the older immigration laws, and so treated the Chinese Immigration laws could be sustained in their entirety and the Act given its full operation in a field not theretofore covered, that is, as against Asiatics other than Chinese who were already taken care of by other laws.

5. If we literally interpret the Act as insisted on

by the Department of Labor, an English traveler for pleasure may not be accompanied by his wife and children unless they come within quota limitations.

6. The government is in the position of claiming repeal by implication of the Chinese Immigration laws, and repeals by implication are never favored in law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1924. No. 769.

CHEUNG SUM SHEE *et al.*,

v.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion for Leave to file Brief as *Amicus Curiae*, and Proposed Brief of *Amicus Curiae*

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Outline of Argument.

Table of Cases Cited.

Other Authorities.

IN THE

Supreme Court of the United States

October Term, 1924.

CHEUNG SUM SHEE *et al.*, *against* JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.	No. 769.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE;*

Also

BRIEF SHOWING THAT QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD BE ANSWERED IN THE NEGATIVE.

Now comes HENRY W. TAFT, an attorney and counsellor of this Court, and represents that there is involved in the above entitled case a question arising under the Immigration Act of 1924, approved May 26, 1924 (43 Stat. 153, c. 190), certified to this Court under Judicial Code, Section 239, the answer to which will vitally affect the interests and status of a number of his clients, who would be prejudiced by a decision affirming the posi-

tion taken below in the above entitled case by the Commissioner of Immigration and by the Government.

Therefore, he prays leave to file a brief and argument as *Amicus Curiae* to the end that the question certified by the Circuit Court of Appeals for the Ninth Circuit be answered in the negative. He is permitted by Counsel for the petitioners herein and by Counsel for the Government to say that they have no objection to the granting of such leave.

The brief and argument proposed to be submitted is as follows:

Statement.

In the decision below the District Court for the Northern District of California, Second Division, denied the right of entry into the United States of wives and minor children of Chinese merchants who were themselves not eligible to citizenship, but who were lawfully domiciled in the United States. The ground for the exclusion of the petitioners was based by the Court upon the provisions of Sections 5 and 13 (c) of the Immigration Act of 1924 [2 Fed. (2d) 995].

On appeal the Circuit Court of Appeals for the Ninth Circuit did not decide the case, but certified to this Court the question, viz: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" (Rec., p. 2).

The answer to the question certified involves a consideration of the following question:

> Is there to be deduced from Section 5 and other provisions of the Immigration Act of 1924 (43 Stat. 153, c. 190) an intent on the part of Congress

to nullify the provisions of the Treaty of November 17, 1880 (22 Stat. 826) between the United States and China, to the extent of denying the right of entry to the wife and children of a Chinese merchant, he himself being admissible though an alien ineligible to citizenship, which they had previously enjoyed under the said Treaty?

POINT I.

The petitioners had a right to enter the United States under the Treaty with China of 1880, and the Immigration Act of 1924 does not show an intent on the part of Congress to impair that right.

1. Treaty rights prior to the passage of the Act of 1924.

The relevant portion of the Chinese Treaty of 1880 is Article II (22 Stat. 827):

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

This Treaty must be read in connection with the Treaty of Commerce and Navigation of 1903 (33 Stat. 2215), by Article XVII of which it is virtually incorporated by reference. The provisions of the Treaty have been recognized by the Department of State and the Department of Labor as constituting a treaty of "commerce and navigation" within the meaning of Clause (6) of Section 3 of the Immigration Law of 1924 which excepts from the exclusion provision of the law "an alien entitled to

enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." (See Circular, Bureau of Immigration, August 7, 1924, entitled "Chinese General Order No. 4", under caption of "Non-Immigrants").

Prior to the passage of the Immigration Act of 1924 the question was presented whether, under Article II of the Treaty of 1880, *supra,* wives and children of Chinese merchants were entitled to the privileges conferred by the Treaty upon the merchants themselves. This question was answered in the affirmative by this Court in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459 (1900). The Court took the broad view that

> "it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded." (p. 466).

The Court, after referring to a divergence of views on the part of Federal District Judges who had had to pass on the question, expressly approved the line of reasoning pursued by DEADY, D. J., in the case of *In re Chung Toy Ho,* 42 Fed., 398 (C. C., Ore., 1890). In that case Judge Deady, after referring to the intention of Congress in passing the Chinese Exclusion Act of 1884 (23 Stat. 115), which was designed to carry the Treaty of 1880 into effect, and after pointing out that under that Treaty a Chinese merchant might bring his "body and household servants" with him into the United States, said (pp. 399-400):

> "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact

that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France.

* * * * * * *

"My conclusion is that under the treaty and statute, taken together, a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. *The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either, unless the intention of Congress to do so is clear and unmistakable.*" (Italics ours.)

United States v. *Mrs. Gue Lim, supra,* was cited in *Yee Won* v. *White,* 256 U. S., 399, 400 (1921). While the wife and minor children who were the petitioners in that case were excluded because the status of the husband and father had changed from that of merchant to that of laborer, nevertheless the *Gue Lim* case was referred to as one which had established the proposition that the wife of a Chinese merchant could not be excluded under the Treaty, "*since this would obstruct the plain purpose of the Treaty of 1880 to permit merchants freely to come and go*" (p. 401; italics ours).

Such being the situation as regards the Treaty with China at the time of the passage of the Immigration Act of 1924, we turn next to the text of the Act. Later we shall refer to numerous expressions of Congressional intent which without exception support our contention.

2. The text of the Act—an analysis.

Section 3-(6) of the Act excepts from the term "immigrant", as used in the Act, "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation". Under familiar principles of law, Congress must be presumed to have been familiar with the judicial interpretation already alluded to by which the term "merchants" as used in the Treaty of 1880 was held to include wives and children of "merchants". See *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); *Ex parte Goon Dip*, 1 Fed. (2d) 811, 813 (1924), *post*, p. 23. And under such interpretation the pertinent part of Section 3 of the Act would be equivalent to the following, viz:

> "When used in this Act the term 'immigrant' means an alien departing from any place outside the United States destined for the United States, except * * * an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation, and his wife and children."

The question raised here is whether the treaty rights thus enjoyed by the wife and children of a Chinese merchant before the passage of the Act of 1924 have been taken away by the second sentence of Section 5 of the Act, which provides as follows:

> "An alien who is not particularly specified in this act as a non-quota immigrant or a *non-immigrant* shall not be admitted as a non-quota immigrant or a *non-immigrant by reason of relationship to any individual* who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." (Italics ours.)

A correct understanding of this provision requires a brief review of the provisions of the Act of 1924 and their general purpose.

Two principles of exclusion of aliens were sought to be put into effect by the statute. These are quite distinct from each other and are based upon independent considerations of policy. Upon the first principle, admissibility of aliens is limited to quotas which are established at fixed percentages of persons who are already lawfully within this country and are of the same nationality or of the same national origin as those seeking admission. The second principle is that of excluding (with certain specified exceptions) aliens "ineligible to citizenship", that class being principally members of Oriental races who are deprived of the right of becoming American citizens because they are not "free white persons" or "aliens of African nativity" or "persons of African descent" (Section 2169 R. S., applied in *Ozawa* v. *United States*, 260 U. S. 178 [1922], *Yamashita* v. *Hinkle*, 260 U. S. 199 [1922], *United States* v. *Thind*, 261 U. S. 204 [1923]).

Most of the elaborate provisions of the Immigration Act of 1924 relate to the first mentioned class. Section 2 relates to immigration visas. Section 3 defines an immigrant, making certain exceptions, including the merchant class already referred to. Section 4 relates to non-quota immigrants, and obviously has no relation to the class who are ineligible to citizenship. Section 5 is entitled "Quota-Immigrants", and we think that an examination of the Act will show that it was intended to apply only to the class referred to in its caption, that is, to "quota-immigrants". Section 6, entitled "Preferences Within Quotas", obviously refers to the Quota system. Section 7, referring to an application for an immigration visa, Section 8 providing for "non-quota" immigration visas, Section 9 entitled "Issuance of immigration visas to relatives", Section 11 entitled "Numerical Limitations", Section 12 entitled "Nationality", Sec-

tion 17 relating to entry from foreign contiguous territory and Section 18 relating to "Unused immigration visas;—all these relate to the Quota system. The only sections of the law which more or less bear upon the question of the exclusion of aliens "ineligible to citizenship", are Section 3 defining the word "immigrant", Section 5 already referred to, Section 13, which is the comprehensive section dealing as its title indicates with "Exclusion from the United States", Section 15 relating to "Maintenance of Exempt Status", Section 28, in which are given general definitions of terms employed in the preceding sections of the act, and possibly Section 25, providing that an alien admissible under some other law "shall not be admitted to the United States if he is excluded by any provision of this Act."

The provisions relating to burden of proof, rules and regulations and penalty provisions, do not affect the question under consideration.

The attempt by Congress to merge in one act provisions for the quota system of exclusion and that based upon ineligibility to citizenship, has led to some confusion in phraseology which requires careful analysis.

Bearing these facts in mind, we first take up the provisions of Section 5.

As we have said the caption of this Section describes it as referring only to "*quota-immigrants*". If its terms relate to that class alone it is logically inserted between Section 4 and Section 6, for Section 4 defines non-quota immigrants and Section 6 describes the preference within quotas, while Section 5 defines "Quota immigrants" as those who are not non-quota immigrants; it does not define "immigrants",—that was done by Section 3. If the title of the section is correct in confining its application to "quota immigrants" then there is an inconsistency in the reference in the second sentence of the section to "a non-immigrant";

for there is not in any of the quota provisions of the entire act any alien subject to the quota provision who could be described as a "non-immigrant", all of those provisions referring solely to immigrants who are either "quota immigrants" or "non-quota immigrants."

But it is upon this use of incongruous terms in section 5 that the principal argument is based that there is an intention by the provisions of the section to nullify the exclusion from the definition of "immigrant" the wives and children of Chinese merchants, although not affecting the status of the merchants themselves. In other words, the claim is that, in spite of the inconsistency of the words in the title and in the body of Section 5, there is to be ascribed to Congress an intention to qualify the exemption under subdivision (6) of Section 3 so as to exclude the wife and children of a Chinese merchant, although "in pursuance of the provisions" of the existing treaties with China, they were admissible as a part of the merchant class. We submit that there is no such "clear and unmistakable" intention to accomplish such a serious result to be implied from the careless use of the word "non-immigrant" in Section 5. (*In re Chung Toy Ho, ante*, p. 4.)

Section 5 had not been formulated in its present form, as we shall more fully show below, when subdivision (6) of Section 3 was inserted in the act; and at that time the provisions of Section 5 would not have had the serious effect of taking away from Chinese merchants and their families treaty rights then enjoyed by them, for by the first exception in Section 3 exemption was extended to the family of a government official, and in the exemptions (2), (3) and (4) the wives and families of the aliens referred to would themselves, without specification and in their own right, come within the exempted classes, while an alien seaman under (5) would

not generally be expected to be accompanied by his wife or family. It was only when, late in the progress of the bill in the House of Representatives and the Senate, subdivision (6) of Section 3 was inserted, and the second sentence of Section 5 was transferred to that section from another quota section, that support was given for the argument now made that a serious curtailment of the treaty rights of the merchant class was intended.

The importance of the relationship provision of Section 5 arose only in connection with the quota system, and the sole machinery for dealing with it was provided for in Section 9 which was clearly a quota section. That section provides for the manner in which visas may be issued to relatives under Section 4, subdivision (a), and to relatives who, under Section 6, are entitled to a preference within the quota. These were the only cases where admission or preference could under the Act be claimed on account of relationship. They are not cases which affect the quota, although they both are properly cared for in a system based on quotas and non-quotas. If the second sentence of Section 5 is interpreted as excluding all persons *dealt with in the quota system* who claim entry by virtue of relationship to persons entitled thereto as non-quota immigrants, we make it consistent with its title "Quota Immigrants" and a natural concomitant of Section 9. And then if Section 13 is treated as containing all the controlling provisions of the act for the exclusion of all aliens intended to be excluded, the incongruities we have referred to will be avoided.

The purpose that Section 13 shall perform the office of providing for all cases of exclusion is indicated in its title, which is "Exclusion from the United States"; and the text of the section itself clearly differentiates between the two systems of exclusion, that is, the quota system, and that for the exclusion of aliens ineligible to citizenship.

Subdivision (a) of Section 13 provides as follows:

> "(a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws."

Obviously this is intended as a comprehensive provision for the exclusion of all those who have not complied with the quota provisions of the law. Subdivisions (b), (d) and (e) deal with temporary and special cases and need not be especially referred to.

Subdivision (c) provides as follows:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under eighteen years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

Section 4 makes no distinction between immigrants who are and those who are not eligible for citizenship. Its office is solely to exclude from the *quota count* certain specified classes. But the classes mentioned in subdivisions (b), (d) and (e) of Section 4 might be "ineligible to citizenship" although under some earlier law or treaty they were lawfully in this country.* Hence it was neces-

*It is well known that prior to the passage of the Chinese Exclusion Act (23 Stat. 115, c. 220), there were thousands of aliens in this country who were incapable of being naturalized. This appears from the observations of this Court in the *Chinese Exclusion Case*, 130 U. S. 581, 594-596 (1889), read in the light of decisions under U. S. R. S. Sec. 2169, such as *In re Ah Yup*, 5 Sawyer 155 (C. C. Cal., 1878).

sary to except them from the exclusion provision of Section 13, to avoid conflict between the two sections.

If Subdivision (c) of Section 13 be amplified by the inclusion of the pertinent provisions of Section 3 it would read:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien is 'entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' "

Thus interpreted Section 13 would include the wife and children of a Chinese merchant. Such an interpretation would effect what its caption indicates, that is, "exclusion from the United States" in *all* cases in which exclusion is intended. If then Section (5) is construed, as *its* title indicates, as applicable only to "quota immigrants," the two sections are not inconsistent but provide the necessary parts of a harmonious scheme.

It is true that this interpretation requires a rejection of the words "a non-immigrant" in Section 5 as being inapplicable to one of the "non-immigrants" excepted from the provisions of Section 3, that is, an alien of the merchant class provided for in subdivision 6 of the latter section. But it would still be applicable to those cases provided for in subdivisions (2), (3), (4) and (5) of Section 3, because, first, those were, as we shall point out, the only provisions in the section when Section 5 were first drafted, and, second, because in no one of those four exceptions is a case presented in which within the reasoning of the decisions of the Court in relation to the merchant class, Congress could be deemed to have intended to include the wives or the families unless they were specified. The same cannot be said in relation to subdivision (6) and in spite of the language of Section 5, that subdivision can reasonably be read to mean that an alien merchant was to enjoy all

of the rights conferred upon him by any existing treaty of commerce and navigation, including the right, as the Chinese treaty had been interpreted by the courts, of having the company of his wife and children because they were of the merchant class. It would not do violence to canons of statutory interpretation to say that when Congress excepted from the class of immigrants alien merchants, the wives and children of aliens were "*particularly specified in this act*" and were, therefore, not within the prohibition of the second sentence of Section 5. Without recourse to close or highly technical reasoning, the Courts practically have said that the family of a Chinese merchant *are themselves members of the merchant class.* In *United States* v. *Mrs. Gue Lim,* 176 U. S. 459 (1900), *ante,* p. 4, for instance, this Court held that the clause in the Chinese Exclusion Treaty providing for the admission of "Chinese * * * merchants * * * together with their body and household servants * * *" should be construed to include the wife and minor children of Chinese merchants. If the same liberality of interpretation is applied to the provisions of the Immigration Act of 1924, and weight is given to the humane considerations which have influenced the courts on former occasions in interpreting the Chinese Exclusion Act, there should be no difficulty in so construing the Act of 1924 as not to impair the treaty rights of wives and children of Chinese merchants. And such an interpretation would be consonant with the general principle that when a statute admits of either of two constructions, one restrictive of rights that may be claimed under a treaty, and the other favorable to them, the latter is to be preferred. *Cf. Chew Heong* v. *United States,* 112 U. S. 536, 549-550 (1884); *Asakura* v. *City of Seattle,* 265 U. S. 332, 342 (1924).

Nothing in *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310 (1924), militates in any way against the liberal construction of the Act of 1924 hereinabove con-

tended for. In the first place, the *Gottlieb* case involved no treaty whatsoever; in the second place, an express provision in the 1917 Act (39 Stat. 874, c. 29) exempted from the excluding provisions "ministers * * * their legal wives or their children" only when such ministers were immigrating from the barred Asiatic zone, whereas Gottlieb came from Palestine. Nor could Gottlieb successfully invoke the 1921 Acts (42 Stat. 5, c. 8; 42 Stat. 540, c. 187), since the pertinent exemption of these acts applied to "ministers of any religious denomination" without mentioning their wives and children; and neither the other provisions of the Act of 1917 nor its legislative history justified a construction of the statute more broad than its plain language required.

3. The Legislative History of the Immigration Act of 1924.

If there is any reasonable doubt as to the meaning of the Immigration Act of 1924, recourse may be had to the committee reports and to the explanatory statements made before Congress by committee members for the purpose of showing the real intention of Congress. *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S., 310, 318 (1918); *Duplex Printing Press Co.* v. *Deering*, 254 U. S., 443, 475 (1921); *United States* v. *Bhagat Singh Thind*, 261 U. S., 204, 214 (1923).

A. The provision excluding aliens ineligible to citizenship was embodied as Section 12, then entitled "Exclusion from United States", in the original bill as reported by the Immigration Committee of the House on February 9, 1924 (H. R. 6540). The bill did not at that time contain the second sentence of Section 5, which was then entitled "Quota Immigrants" and provided only that "When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant". The bill as introduced in the Senate, did not contain any provision relating to the exclusion of aliens ineligible to citizenship. (See Section 3, S. 2576, page

5, and Congressional Record, Vol. 65, page 5415). The only section in that bill relating to exclusion related (1) to the case of an immigrant requiring a visa under the quota system, and (2) to legally admitted immigrants temporarily leaving the United States. It did contain, however, *but in a form which made it applicable solely to the quota system,* the provision which afterwards became the second sentence of Section 5. It was then embodied in Section 3, the caption of which was, "Definition of Immigrant", and was as follows (draft of February 16, 1924, p. 5):

> "No person, who himself is not within any of the exceptions specified in this section, *shall be excepted from the quota restrictions created by this Act by reason of his relationship to any person who is so excepted* or by reason of being excepted from the operation of any other law regulating or forbidding immigration." (Italics ours.)

It is significant that this relationship clause was not made applicable to aliens not eligible to citizenship for at that time Section 3, in its definition of an immigrant, made an exception of "an alien entitled to enter the United States under the provisions of a treaty." Clearly, therefore, in its origin the relationship provision was intended to be a feature of the quota system alone. (See S. 2576, 68th Congress, First Session, February 16, 1924). Not until April 2, 1924, was the provision, slightly amended, but substantially in the same form, agreed to in the Senate. (Congressional Record, Vol. 65, page 5418).

This view of the matter is confirmed by the Report of the House Committee on Immigration, page 4, (No. 176, 68th Congress, First Session, to accompany H. R. 6540, dated February 9, 1924).

In defining the difference between quota immigrants and non-quota immigrants the Committee said (p. 9):

> "As hereinbefore noted, the bill provides for admission of certain alien immigrants as 'non-

> quota immigrants' exempt from count under all quota limitations. But the 'non-quota immigrant' as well as the 'quota immigrant' must obtain an immigration certificate. And *if he claims to be a non-quota immigrant by reason of relationship* to a citizen of the United States (as in subdivision (a) of Sec. 4), his immigration certificate is issuable only after his case has received consideration in the Bureau of Immigration upon petition filed by the relative whom he proposes joining in the United States."

Upon proof of compliance with the preliminaries provided for in the bill the Commissioner General of Immigration was to "authorize the consul to issue a 'non-quota' immigration certificate to the intending immigrant," that is to the one claiming by virtue of relationship. (Report, p. 10). There is no intimation that the provision was to apply to an alien who was not, under Section 3, an immigrant.

In the Report (No. 350, 68th Congress, First Session) of the House Committee on Immigration and Naturalization (committed to the Committee of the Whole House on March 24, 1924), the Committee repeated that the relationship provision of the bill (H. R. 7995) was intended to be applied only to non-quota immigrants (Report, p. 18).

Finally, the Report (No. 716, 68th Congress, First Session, May 12, 1924) of the Managers on the part of the House in the Committee of Conference reported back the bill (H. R. 7995) and *for the first time there appeared the second sentence of Section 5.* There was no statement of the reason for its insertion. If it had been the intention to extend the application of the relationship provision, which up to this point had clearly been confined in its application to immigrants who came within the quota provision of the statute, the managers would surely not have omitted some explanation of such a radical change. It is incredible that after it had been repeatedly stated, as we shall show that it was, both in the House and in the Senate, that treaty rights of persons had been fully

protected (see page 4, House Report No. 350), Congress could have intended, by the insertion at the last moment of the second sentence of Section 5, to diminish those rights in the manner now claimed by the Government.

B. *Statements of Committees and Members of the House and the Senate.* On April 27, 1924, Senator Shortridge in the Senate offered the amendment which in substance was embodied in Section 3, and by the terms of which there were excepted from the definition of immigrants "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." He also offered an amendment in the following words:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of section 3."

Speaking of these two amendments he said:

> "These amendments recognize and *in no degree annul* any existing treaty of commerce and navigation." (65 Congressional Record, p. 5741). (Italics ours.)

Referring to Secretary Hughes' letter of February 8, 1924, addressed to Congress for the purpose of preventing an impairment of treaty rights, he said:

> "What Secretary Hughes feared was lest by this legislation we offend against existing treaties. We have avoided that altogether in the bill. [Congressional Record, Vol. 65, p. 5743] * * * the Secretary of State will now see clearly that we do not propose in this bill *in any wise to modify, annul, or disregard the provisions of the treaty of 1911.*" (Congressional Record, Vol. 65, p. 5744; italics ours.)

And again:

> "*Whatever rights are guaranteed to Japan under that treaty are to remain.* We are not disposed to question the terms of the treaty. There it is. This Nation has set its hand to it. There is the treaty, and there let it be, and let it be observed." (Congressional Record, Vol. 65, p. 5746; italics ours.)

And again:

> "* * * we respect not only this treaty but all existing treaties of commerce and navigation, as my proposed amendment specifically states." (Congressional Record, Vol. 65, p. 5806).

Senator Shortridge called attention specifically to the fact that when on February 8, 1924, the Secretary of State suggested that the bill in its then form was violative of treaty obligations, "the House bill did not contain the provision it now contains, and which I propose to incorporate in the Senate bill, namely, the provisions specifically stating that *it shall not interfere with the coming of any peoples who come under or pursuant to any treaty of commerce and navigation.*" (Congressional Record, Vol. 65, p. 5809; italics ours.)

On April 8, 1924, Senator Reed of Pennsylvania, who was in charge of the bill in the Senate, said that after consultation with the two Senators from California and the Senator from Arkansas, and with Congressman Johnson of Washington, who had charge of the bill in the House, and with others who had been active in the passage of the Immigration Law, he proposed an exclusion section which was "in accordance with the bill that already has passed the House." The amendment referred to contained the provision:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-immigrant under the

provisions of Section 3." (Congressional Record, Vol. 65, p. 6377.)

Expressions in the reports of the Committee on Immigration and Naturalization of the House of Representatives show that there was no intention to affect the treaty rights. In his letter of February 8, 1924, Mr. Hughes, the Secretary of State, had called attention to the effect upon the treaty rights of Japanese merchants under Article 1 of the treaty of Commerce and Navigation between the United States and Japan concluded in 1911, and his comment was that Section 12, subdivision (b) (subsequently enacted as Section 13, subdivision (c)), taken in connection with Sections 3 and 4 of the proposed bill "operates to exclude Japanese" and "establishes a statutory exclusion." (House Report No. 350, page 4.) Under the caption "Protection of Treaties" the Committee reported (p. 2):

> "The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 (p. 5) of an additional exempted class, to-wit:
>
> "'(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.'"

This is the exact form in which the exemption was stated in the bill as passed. The Committee adds (p. 6):

> "So far as concerns the treaty of 1911, the committee assumes that the modifications now made in the bill will remove the Secretary's objections, * * *."

Subsequently, on the floor of the House of Representatives, Mr. Johnson the Chairman of the Committee, stated:

> "We undertake to make full provision for • • • all who may want to come in under any of the provisions of any treaty we may have with the other nations of the world." (65 Congressional Record, 5649. See many other expressions of similar import, at pp. 5649, 5661, 8229 and 8233.)

It must, of course, be presumed that Committees and Members of Congress knew, when they passed the Act of 1924, what the rights of aliens under existing treaties were. Those rights were not *created* by the decisions of the Courts. They existed by virtue of the treaties themselves. In *In re Chung Toy Ho*, 42 Fed. 398 (C. C. Ore., 1890), *ante*, p. 4, the Court pointed out that wives and children of merchants belonged to the merchant class within the fair intendment of the Chinese treaty, and it is to that effect of the treaty to which members of Congress must be deemed to have referred in the expressions we have quoted above.

4. Interpretation of the law by administrative officials charged with its enforcement.

The views presented above find some confirmation in the interpretation which has already been placed upon the act of 1924 by the Secretary of State, the Secretary of Commerce, the Secretary of Labor and by the President himself. Under the provisions of Section 12, it is the duty of the three Secretaries referred to to report annually to the President the quota allotted to the several nationalities of the world. On the basis of reports thus made, the President on June 30, 1924, issued a proclamation putting the quotas into effect. These quotas were established only for those countries whose citizens were eligible to citizenship. It is true that a minimum quota of 100 was established for those countries whose inhabitants were not generally eligible to citizenship (*e. g.*, China), but this was not a minimum fixed in relation to aliens ineligible to citizenship, for in the proclamation the President expressly stated that

the minimum quota was to be "available only for persons born within the respective countries *who are eligible to citizenship* in the United States and admissible under the Immigration Laws of the United States." This interpretation clearly recognizes that there was no quota of any kind established for aliens not eligible to citizenship. The provision made by the President only related to those few cases where there might be aliens residing in China, for instance, who happened to be for some reason eligible to citizenship in the United States.

The general orders of the Bureau of Immigration of the United States Department of Labor also recognized that the quota system is not applicable to immigrants who are exempt under the provisions of Section 3. Referring to that section in the Second Supplement to General Order No. 30, under date of July 3, 1924, the Commissioner General has made the following provision:

> "Aliens of this class, while not required to present an immigration visa, must be possessed of a regular passport bearing the Consul visa."

In other words an alien of the class referred to must have a passport similar to that required from any foreigner not subject to quota provisions.

In the Third Supplement to the General Order, under date of August 1, 1924, it is provided as follows:

> "2. No alien shall be admitted to the United States as a non-immigrant unless such alien shall present to the proper immigration official, at the port of arrival, a passport visa duly issued and authenticated by an American consular officer; * * *."

It is significant that in this same order it is provided as follows:

> "1. No immigrant whether a quota immigrant or non-quota immigrant of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration of-

> ficial, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer; * * *."

Thus, the distinction between an immigration visa in the case of those coming within the quota provisions of the act and the passport visa applicable to aliens who are not immigrants and who are exempt under Section 3, seems to be accepted by the Bureau of Immigration. Some confusion seems to have existed in the Bureau, and on October 27, 1924, the Commissioner General issued the following order as the Seventh Supplement to General Order No. 30, namely:

> "As the Fourth Supplement to General Order No. 30 directing that surrendered immigration visas be forwarded to the Bureau of Naturalization, Department of Labor, Washington, D. C., *has no practical application to persons of races ineligible to citizenship, it is, therefore, directed that the surrendered immigration visas of such persons be retained at the ports where surrendered.*" (Italics ours.)

These references serve to show that the two systems of exclusion already referred to are independent of each other.

5. Decisions of the lower courts under the Immigration Act of 1924.

The District Court in the case at bar admitted the strength of the argument that "husbands and wives and their children have a natural right to be and reside with one another, a right universallly recognized and enforced by municipal laws", but he added that such right must of necessity give way to the sovereign right of a state to dictate what alien persons should "be permitted to come within its territorial boundaries." Without much amplification of reasoning and with scarcely more than a reference to the several sections of the Immigration Act of 1924, the court concluded that a careful consideration of Section 5, "convinces me that the

construction of subdivision (6) of Section 3 thereof, upon which the contention is founded, has been by Congress excluded *ex industria.*" The attention of the court was not apparently called to the two systems of exclusion discussed above, and the decision was based upon a narrow interpretation of the phraseology of two sections of the act, without consideration of its general scope and purpose.

Two other decisions deserve notice. In *Ex Parte Goon Dip,* 1 Fed. (2d) 811 (District Court, W. D. Washington, 1924), a question arose as to whether the wife or minor children of a resident Chinese merchant were excluded by the provisions of the act of 1924. Judge Neterer reviewed the decisions prior to the passage of the act holding that the wife and minor children of Chinese merchants were admissible in spite of the Chinese Exclusion Act, and after an examination of the several provisions of the act, concluded as follows, viz. (p. 813):

> "The report of the committee and the express provisions of the act clearly show the intent of the Congress not to disturb the relations existing under the prior law and treaty. I think that this act and the treaty and 'immigration law' and prior judicial construction of the treaties and law and departmental construction must all be considered together, and under such consideration the court will be slow to assume that Congress intended to treat the treaty stipulations as a 'scrap of paper'."

In *Ex Parte So Hakp Yon,* 1 Fed. (2d) 814 (1924), decided the day after the decision in *Ex Parte Goon Dip,* the same Judge held that the wife of a Japanese merchant was not admissible under Section 13 of the Immigration Act of 1924 because the provisions of the treaty with Japan of April 5, 1911, were not such that they could be reasonably interpreted as intended to permit the entry of wives of Japanese merchants. The

court distinguished between the Chinese Exclusion Act of 1880 which provided for the admission of "Chinese * * * merchants * * * together with their body and household servants", and the Japanese treaty of April 5, 1911, which provided as follows (Article I, 37 Stat., 1504):

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

A consideration of this treaty is not involved in the case at bar, but it is proper to say that the interpretation of the District Judge is not consonant with the liberality of interpretation approved by the decisions above referred to, rendered before the passage of the act of 1924. The right "to enter, travel and reside" and "to own or lease and occupy houses", and to "lease land for residential * * * purposes", and "generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *" is even more comprehensive and more inclusive than the words "together with their body and household servants" employed in the Chinese Exclusion Treaty. All of the arguments of Judge Deady in *In Re Chung Toy Ho* (*supra,*) concurred in by this Court in *United States* v. *Mrs. Gue Lim, supra,* ought to have led to a broader interpretation than that of Judge Neterer in the *So Hakp Yon* case. Furthermore, for reasons already fully set forth in our argument above, Judge Neterer failed to give weight to

the two systems for admission of aliens into this country. He said [1 Fed. (2d), at p. 815]:

> "This section [5] expressly excludes the wife, as the husband is a *non-quota immigrant*, and *she may not be admitted by reason of such relationship.*" (Italics ours.)

This, for the reasons we have already sufficiently stated, shows that the District Judge incorrectly assumed that the husband was a non-quota immigrant, whereas, under Section 3, he was not an immigrant at all.

POINT II.

For these reasons it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the negative.

HENRY W. TAFT,
Amicus Curiae.

New York, March 20th, 1925.

No. 769

In The Supreme Court Of The United States

OCTOBER TERM, 1924

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, RED HING FONG, WONG BEN JUNG, HONG CHOW JUNG, MOK LIN PARK, NG SHEE, On Habeas Corpus,

Appellants and Petitioners,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee and Respondent.

CERTIFICATION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion for Leave to file Brief as *Amicus Curiae*, and Proposed Brief of *Amicus Curiae*

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Motion for Leave to file Brief as *Amicus Curiae*, and Proposed Brief of *Amicus Curiae*

MOTION

John J. Sullivan, Roger O'Donnell and W. J. Peters, desiring, *amicus curiae*, to submit to this court their brief on behalf of the appellants and petitioners herein, respectively show:

That they are the attorneys for the petitioners in *Ex parte Goon Dip*, 1 F. (2d) 811, 813, 814. This was an application to the United States District Court for the Western District of Washington, Northern Division, for a writ of habeas corpus on behalf of seventeen Chinese persons who applied for admission

to the United States at the Port of Seattle subsequent to July 1, 1924, claiming to be respectively the wives and minor children of Chinese merchants lawfully domiciled in the United States. They were denied admission by the Commissioner of Immigration upon the ground that, admitting their claimed status, they were inadmissible under the provisions of the Immigration Act of 1924. This finding was sustained by the Secretary of Labor. It was held by Judge Neterer that the wives and minor children of Chinese merchants lawfully domiciled in the United States were admissible under the provisions of the Act in question, and the writs were granted. An appeal from the judgment being taken by the government, it was stipulated by respective counsel that such appeal presented the identical questions to be determined by this court in this cause, and that the same should await, and abide by such determination.

It is therefore apparent that the petitioners in *Ex parte Goon Dip* are vitally interested in the questions to be determined herein by this court, and their counsel deem it their duty to present their brief, *amicus curiae*, and most respectfully moves that the same be filed and considered.

STATEMENT OF FACTS

The petitioners herein claiming to be respectively the wives and minor children of Chinese merchants

lawfully domiciled in the United States, applied for admission at the Port of San Francisco subsequent to July 1, 1924, at which time the Immigration Act of 1924 became effective. Without investigation as to the mercantile status of the husband and father, nor the applicants' relation to him, the Commissioner of Immigration denied them admission, and upon appeal to the Secretary of Labor it was held that, conceding the relationship and the mercantile status of the husband and father, they were inadmissible as a matter of law,

> "* * * because of the inhibition against their coming to the United States as found in paragraph (c) of section 13 and that portion of section 5 which reads as follows: 'An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.'"

Thereupon the petitioners applied to the United States District Court for the Northern District of California, Southern Division thereof, Second Division, for a writ of habeas corpus, claiming that they were respectively the wives and minor children of Chinese merchants lawfully domiciled in the United States, and as such were lawfully entitled to admis-

sion, and that they were illegally restrained by the Commissioner of Immigration at San Francisco, and praying that they be restored to their liberty. From an adverse judgment petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court certified the following question to the Supreme Court of the United States:

> "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled in the United States prior to July 1, 1924, such wives and children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

ARGUMENT

In support of our contention that the question submitted to this court for its determination should be answered in the negative, we shall discuss what we consider to be the two major propositions involved.

> 1. The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States to enter the United States prior to the Immigration Act of 1924.

The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States to enter the United States prior to the Immigration Act of 1924, is conceded, and we call particular at-

tention to the source of that right, not for the purpose of showing that it existed, but because of the light which it throws upon the intention of Congress in enacting the law in question.

This right does not depend upon statutory enactment, but is based upon treaty stipulations between the United States and China. We quote first from Article V of the Burlingame Treaty of 1868 (Malloy's Treaties, Vol. 1, p. 211.)

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade or as permanent citizens." * * *

> "Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may be enjoyed by the citizens or subjects of the most favored nation; and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

The treaty of 1880 (Malloy's Treaties, Vol. 1, p. 237) provides, in Article I, that the Government of the United States may, if in its opinion it becomes necessary, limit or suspend the coming of Chinese laborers into the United States, and adds:

> * * * "The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." * * *
>
> "Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiousity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Following this came the Convention Regulating Chinese Immigration of 1894. (Malloy's Treaties, Vol, 1, p. 241). This treaty, to be in force for the period of ten years, provides in Article III, that,

> "The provisions of this Convention shall not effect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. * * *"

In 1903, these countries entered into a "Treaty as to Commercial Relations, (Malloy's Treaties, Vol. 1, p. 261) and declaring the United States and China to be "animated by an earnest desire to extend further the commercial relations between them," provided in Article XVII, as follows:

> "It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January, A. D. 1900, are continued in full force and effect except in so far as they are modified by the present treaty or other treaties to which the United States is a party."

It will be observed that the Treaty of 1880, Article II, specifically enumerates the classes of Chinese subjects *"who shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."* Chinese merchants are one of the classes enumerated. Succeeding treaties and conventions do not establish or create the right of these classes to enter the United States—they simply recognize and contintue the right.

The right of the wives and minor children of Chinese merchants lawfully domiciled in the United States, is declared by Judge Deady *in re Chung Toy Ho,* 42 Federal 398, *to be a treaty right,* a right based upon the Treaty of 1880, between the United States and China. He says: :

> "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children, particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn into the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

In the case of the *United States vs. Gue Lim*, 83 Federal 136, Hanford, District Judge, held with Judge Deady upon this question. This case being appealed to the Supreme Court of the United States, (176 U. S. 459; 44 Law Ed. 544) that court, after quoting Article II, of the treaty, says:

> "It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty; * * * The act was never meant to establish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly

and reasonably construed, it does not do so. If we hold that she is entitled to come in as the wife, because the true construction of the treaty and act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife. In the case of minor children the same result must follow as that of the wife."

In the case of *Yee Yon vs. White,* 256 U. S., 399, which turned upon the construction of section 6 of the Act of July 5, 1884, Mr. Justice McReynolds, speaking for the court, says:

> "* * * that the section should not be construed to exclude their wives, since *this would obstruct the plain purpose of the treaty of 1880, to permit merchants freely to come and go.*" (Italics ours.)

It is thus fixed and established that Article II of the Treaty of 1880, between the United States and China, as construed by the Federal Courts, including this court, was in full force and effect on July 1, 1924, and that it accorded to the wives and minor children of Chinese merchants lawfully domiciled in the United States, the right to enter this country; *the right to "go and come of their own free will and accord."*

The second proposition is:

2. Does the Immigration Act of 1924, exclude from admission to the United States the wives and minor children of Chinese merchants lawfully domiciled in this country?

At the very outset there seems to be a complete and decisive answer to this question. That answer is contained in the suggestions made to the Committee on Immigration and Naturalization by Secretary Hughes, and the changes made in the bill as reported by the Committee, in accordance with the suggestions made by the Secretary.

In his letter of February 8, 1924, addressed to Hon. Albert Johnson, Chairman of the Committee (Appendix, p. 25 Minority Report Committee on Immigration and Naturalization) referring to the immigration bill then before the committee, Secretary Hughes says:

> "It is hardly necessary for me to say that I am in favor of suitable restrictions upon immigration. The questions which especially concern the Department of State in relation to the international effects of the proposed measure are these:: (1) The question of treaty obligations; * * *"

> First—Treaties.—According to the terms of the proposed measure "immigrant" is defined (sec. 3) as "any alien departing from any place outside the United States destined for the United States, except (quoting subdivisions 1 to 5 inclusive as contained in the Act)."

> The result is that under this definition of "immigrant" all aliens are subject to the restrictions of the proposed measure unless they fall within the stated exceptions. The question at once arises

whether there would be aliens not falling within those exceptions who would be entitled to be admitted under our treaties.

* * * * * * *

In my opinion the restrictions of the proposed measure, in view of their application under the definition of "immigrant," are in conflict with treaty provisions. The exception in subdivision (2) of section 3 with respect to aliens visiting the United States "temporarily for business or pleasure" would not meet the treaty requirements to which I have referred, for this phrase would seem to indicate a stay more temporary than that permitted by these provisions, and the right established by treaty can not be cut down without a violation of the treaty so long as it is maintained in force. Accordingly I take the liberty of suggesting that there be included in section 3 of the proposed measure an additional exception to read as follows: :"an alien entitled to enter the United States under the provisions of a treaty."

I should add that the persons entitled to enter and reside here under the terms of our treaties for the purpose of trade and commerce are not those against whom immigration restrictions are deemed to be necessary."

Referring to this suggestion of Secretary Hughes, the Committee, in its report, at page 2, says:

"The suggestion of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to

section 3 (p. 5) of an additional exempted class, to-wit:

> (6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

The original suggestion of Secretary Hughes was for an exemption in these words:

> "An alien entitled to enter the United States under the provisions of a treaty."

Subsequently the Secretary suggested the following words:

> "An alien entitled to enter the United States under the provisions of an existing treaty."

> The committee has incorporated in H. B. 7995 Secretary Hughe's proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.

* * * * * * *

> Your committee feels that this additional exemption * * * is broad enough to take care of all the clauses of our commercial treaties * * *"

It will be noted that the additional exception to section 3, as proposed by Secretary Hughes, and the

exception (subdivision 6) as added by the committee, differ in this important respect: In the former it was proposed to except *all aliens entitled to enter the United States under the provisions of an existing treaty,* while the latter excepts those aliens only who are entitled to enter the United States *solely to carry on trade under in pursuance of the provisions of a present existing treaty of commerce and navigation.*

The treaty between this country and China being recognized and conceded to be one of commerce and navigation, and it being the expressed intention of the committee to except from the restrictions of the Immigration Act of 1924, aliens entitled to enter solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation, and as Article II of the treaty with China, as construed by the Supreme Court, accords the right of entry to his alien wife and minor children as well as to the merchant himself, the sole remaining question to be discussed is:

Does the act express the avowed intention of the committee?

Many provisions of the act, tending to support the position of counsel for the petitioners, are cited and discussed in their elaborate and able brief. We confine ourselves solely to those provisions of the act which

are cited by the Secretary of Labor in support of his finding that these petitioners are inadmissible as a matter of law. He cites two provisions of the act, as follows:

Paragraph (c) of section 13, which reads:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife or unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

That portion of section 5 which reads as follows:

> "An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

It is plain that the Secretary of Labor construes paragraph (c) of section 13 to exclude these petitioners because, (1) they are aliens ineligible to citizenship, and (2) because they are not specified in the exceptions; taking the position that they are not non-immigrants as specified in subdivision (6) of section 3. As to the quoted portion of section 5, the Secretary's position must be that the merchant husband is a non-immigrant under the provisions of subdivision

(6) of section 3, and that his wife and minor children seek admission solely by reason of their relationship to such non-immigrant, and are therefore excluded under the provisions of section 5.

SUMMARY

When the committee, following the suggestion of Secretary Hughes, added subdivision (6) to section 3, making the section read, so far as is pertinent here:

> "When used in this act the term "immigrant" means any alien departing from any place outside the United States destined for the United States except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

it was for the express purpose of preserving to aliens the right to enter the United States when so entitled under the provisions of an existing treaty of commerce and navigation. The committee had before it the fact that such a treaty between the United States and China was in existence, and that this treaty, as construed by the Supreme Court, accorded the right of entry to the Chinese merchants and their Chinese wives and minor children. By the addition of subdivision (6) to section 3 the committee intended to, and did, include all aliens entitled to enter the United States under an existing treaty of commerce and navigation.

The position of the Secretary of Labor is that the

wives and minor children, being related to their non-immigrant husband and father, are excluded under the provisions of section 5, *"by reason of such relationship."* This ignores the fact that these wives and children *are themselves* exempted by subdivision (6) of section 3, and, equally with the father, are within the terms of Article III of the treaty with China, being aliens *"entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation."* Such a construction squares exactly with the avowed purpose and intention of the committee, for in its report it says, at page 2:

> "The committee has incorporated in H. B. 7995 Secretary Hughes' proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation."
>
> * * * * * * *
>
> " * * * Your committee feels that this additional exemption does not pass the control from Congress, and feels also *that it is broad enough to take care of all the clauses of all our commercial treaties,* * * * " (Italics ours).

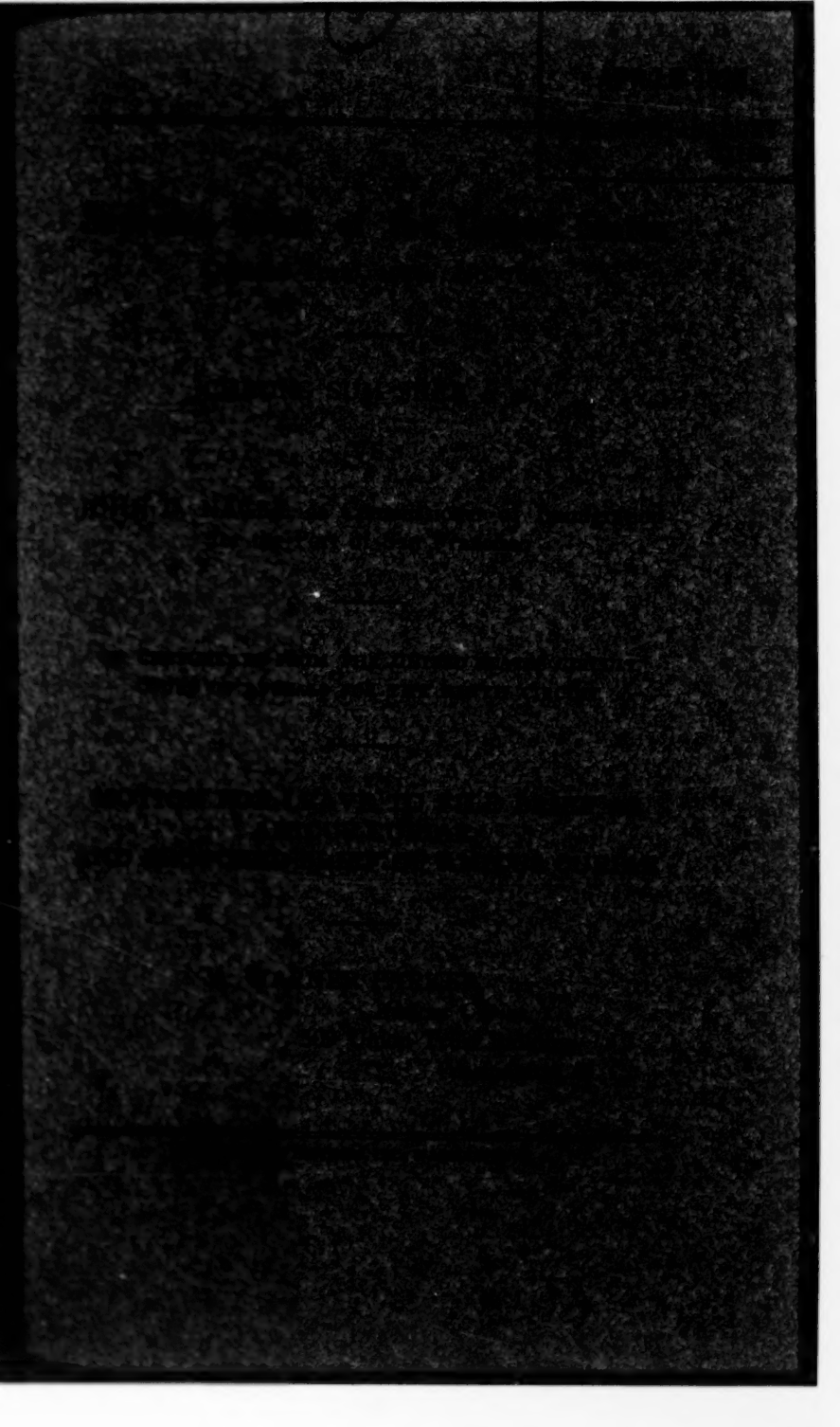
These petitioners are not excluded under the provisions of paragraph (c) section 13 because they are not immigrants as defined by section 3. They are not effected by the provisions of section 5 because

they are included in, and exempted by the provisions of subdivision (6) of section 3.

We respectfully maintain that the question certified to this Honorable Court for its determination should be answered in the negative.

Respectfully submitted,

JOHN J. SULLIVAN,
ROGER O'DONNELL,
W. J. PETERS,
Amicus Curiae.



OUTLINE OF ARGUMENT

TABLE OF CASES CITED

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1924.

CHEUNG SUM SHEE *et al.*,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.

No. 769.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE;

Also

BRIEF SHOWING THAT QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD BE ANSWERED IN THE NEGATIVE.

Now comes A. WARNER PARKER, an attorney and counsellor of this Court, and represents that there is involved in the above entitled case a question arising under the Immigration Act of 1924 (43 Stat. L., 153, c. 190), certified to this Court under Sec. 239 of the Judicial Code, an answer to which may vitally affect the status and interests of a number of his clients, as such clients would be injured by a decision affirming the position taken in the above entitled case by the administrative

officials of the Government and by the District Court, Northern District of California.

Therefore, he prays leave to file a brief and argument as Amicus Curiae, to the end that the question certified by the Circuit Court of Appeals for the Ninth Circuit may be answered in the negative. He is permitted by Counsel for the petitioners and for the Government herein, respectively, to say that they have no objection to the granting of such leave.

The brief and argument proposed to be submitted follows:

STATEMENT OF THE CASE

The several petitioners (appellants) herein are wives or minor children of Chinese merchants, the husbands or fathers being lawfully domiciled in the United States. They were refused admission by the immigration officials at San Francisco because those officials conceived that the following two provisions of the Immigration Act of 1924 created an "inhibition against their coming to the United States:"

> "Sec. 13. * * *
> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."
>
> "Sec. 5. * * * An alien who is not particularly specified in this Act as a non-quota immigrant

> or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

The District Court, Northern District of California, refused to grant a writ of habeas corpus and sustained the action of the immigration officials [2 Fed. (2nd), 995]; thereupon the case was appealed to the Circuit Court of Appeals, Ninth Circuit, which Court then certified to this Court the following question:

> "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" (Rec., p. 2.)

Of the exceptions attached to section 13 (c), by cross-references to section 3, only one, the last, is relevant here. Attaching that cross-referenced exception to the material part of section 13 (c), the whole provision reads as follows:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien [is] entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

No one disputes, in this case or elsewhere, that a Chinese merchant is still, as hertofore, entitled to enter the United States, to carry on trade or business here, by virtue of the provisions of the treaties now existing between China and this country. No question concerning his per-

sonal right of entry is here at issue. But the questions at issue are:

1. Considering the spirit and the purposes as well as the letter of the statute, is the exception in question broad enough to insure that the new law does not deprive such merchant of the natural and inherent right, never taken away by any previous statute or by any treaty, of having with him here, in the place of his own domicile, his wife and minor children? Does the new law so change the classification of the wife and children that they can no longer be regarded as belonging to the treaty protected class?

2. Or, on the other hand, must the exception, when considered by itself or in connection with other provisions of the statute, be regarded as utterly destroying the privilege of entry and residence heretofore enjoyed by such wife and minor chilren, and as cutting down the privilege of the merchant to such extent that, while still permitted to enter this country in pursuance of the treaties, if he cares to come or to remain alone and separated from his entire family, and to remain here temporarily or permanently as he may choose, he can no longer enjoy his natural and inherent right of having the immediate and dependent members of his family with him in the place of his domicile?

POINT I

The Specific Exemption in Favor of the Treaty Protected Classes Covers the Petitioners Herein.

By Article XVII of the treaty of commerce and navigation with China of 1903 (33 Stat. L., 2208), the immigration treaty with China of 1880 (22 Stat. L., 826)

is perpetuated and merged with said commercial treaty. In view of this, there can be no doubt that the position which has been taken by both the Department of State and the Department of Labor, to the effect that the treaty of 1880 should be regarded as a "treaty of commerce and navigation" within the meaning of clause (6) of section 3 (Department of Labor circular of instructions No. 55,266 of August 7, 1924, paragraph 9-A), is undoubtedly sound.

Article II of the 1880 treaty provides that Chinese merchants, "together with their body and household servants, * * * shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Conceding that the right of entry guaranteed by the treaty is still preserved so far as merchants themselves are concerned, the administrative officers have in this case taken the position that the wives and minor children of such merchants can no longer be admitted. They base this holding upon the circumstance that clause (6) of section 3 does not say, in so many words, that the wives and minor children of men entitled to come here in pursuance of treaties shall be allowed to enter, and upon consideration in connection with section 13 (c), of other sections of the law (sections 5 and 25, hereinafter shown to be separate and distinct and to have a field of operation of their own). In the main, the contention seems to be that clause (6) of section 3, attached by reference to section 13 (c), even when considered in conjunction with Article II of the treaty, does not literally specify that the wives and minor children of merchants may enter.

In the early days of the administration of the Chinese exclusion laws this same contention was made. The ad-

ministrative officers then took the position that, because Article II of the 1880 treaty mentioned merchants and their body and household servants, without referring specifically to their wives and minor children, the latter were inadmissible. But the courts, including this Court, took a different view of the matter.

In the case of *Chung Toy Ho* and *Wong Choy Sin*, the administrative officers excluded the wife and child of a Chinese merchant, holding that they could not be admitted simply because they were so related to a man guaranteed the right of admission by the treaty. But Judge Deady pointed out that:

> "The station in life of the petitioners, being the wife and child of a merchant, also shows they do not belong to the laboring class. The petitioners are not within the purview of the exclusion act of 1888, which is confined to laborers. * * * Chinese women are not teachers, students, or merchants; and therefore they cannot, as such, obtain the certificate necessary to show that they belong to the favored class. But, *as wives and children of* 'teachers, students, and *merchants,' they do in fact belong to such class;* and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact." (42 Fed., 398, 399. Italics volunteered.)

This Court later, in the case *United States vs. Mrs. Gue Lim*, 176 U. S. 459, 464, was confronted with the same question. After pointing out that there had been some difference of opinion among the lower courts, this Court said:

> "It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge

Deady. *Re Chung Toy Ho*, 42 Fed. Rep., 398, 9 L. R. A., 204. In our judgment the wife in this case was entitled to come into the country without the certificate mentioned in the act of 1884."

In the *Gue Lim* case this Court also said (p. 468):

"* * * When the fact is established to the satisfaction of the authorities, that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

In the very recent case of *Yee Won vs. White*, 256 U. S. 399, 400, 401, in referring to the Gue Lim decision, this Court said:

"But that case turned upon the true meaning of section 6, Act of July 5, 1884, which required every Chinese person other than laborers, as a condition of admission, to present a specified certificate. The conclusion was that the section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go."

The decisions from which the foregoing quotations are taken, clearly show that under the treaty of 1880 wives and children of merchants are entitled to enter the United States: first, by reason of belonging to the merchant class; second, because of the right of the husband and father, under the spirit of the treaty, to have them with him in the place of his domicile, so that he may enjoy the company of the wife and the care and custody of the children, and so that his privileges and opportunities for

taking advantage of the rights conferred upon him by the treaty, of entering this country freely and remaining as long as may be necessary to the conduct of his business, may not in any way be obstructed.

The situation with respect to merchants and their wives and minor children having been such as just described at the time of the enactment of the 1924 Act, and there being nothing in the exempting clause indicating the contrary, it would seem to be only reasonable to hold that those entitled to enter under clause (6) of section 3 "to carry on trade under and in pursuance of a present existing treaty" include, not only merchants and their "body and household servants," but the wives and minor children of merchants as well; for a "present existing" treaty had been so construed by the highest judicial authority and through a period of almost a quarter of a century had been so administratively applied, and it must be assumed that Congress knew of this judicial construction and administrative application when passing the new law and expected and intended that such law, dealing with the same subject, would be construed and applied in the same manner.

For the sake of emphasis and clear understanding, however, let us for a moment get away from the ineligible-to-citizenship angle of the matter and consider the exemption from the point of view of the quota-visa system.

We also have a treaty of commerce and navigation with Great Britain, standing since 1815. It is provided by article I of that treaty, *inter alia*, that subjects of Great Britain shall have the right freely to enter the territories of the United States, "and to remain and reside in any parts of the said territories * * *; also to hire and occupy houses and warehouses for the purposes of their

commerce." Could anyone suppose for a moment that, for example, if one of the proprietors of a large London importing and exporting house should determine to establish and assume personal charge of a branch of his business in New York, such alien would be classified under clause (6) of section 3 as a non-immigrant and admitted, without a visa, and his wife and minor children, whom he desired to have live with him in New York, classified as immigrants and, the British quota being exhausted at the time, denied visas and excluded? Yet, the principle there is exactly the same as it is here. If that merchant is entitled to have his wife and minor children placed in the same class as himself under the law, the Chinese merchant is also entitled to that privilege, for the substance of the exemption is the same in both cases. There, as here, also, denial to the merchant of the privilege of having the dependent members of his family with him in the place of his domicile "would obstruct the plain purpose of the treaty * * * to permit merchants freely to come and go." (Yee Won v. White, *supra.*) Moreover, "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." (Asakura v. Seattle, 265 U. S. 332, 342, and cases there cited.)

While the assertion may be confidently made that no administrative official would think of so applying the law to such a case as that set up hypothetically in the preceding paragraph, the result in this case shows that the administrative officials are applying clause (6) of section 3 to the cases of Chinese as though such clause provided that a male lien or an alien who is in his own personal status a merchant entitled to enter the United States to carry on trade, etc., shall be exempted. But the language

of the clause does not admit of any such restricted interpretation. It is broad enough on its face to include each and every alien, irrespective of sex or exact occupation, so long as such alien is entitled to enter the United States, for business or trade purposes, under and in pursuance of a treaty.

POINT II

The Purpose of the Specific Exemption was the Maintenance of the Status Quo with Respect to All Aliens Guaranteed Admission Privileges by Existing Treaties.

1. The legislative history of the exempting clause.

The exception in favor of treaty protected aliens which now constitutes clause (6) of section 3 has a clear legislative history, consideration of which can leave no doubt that the intention of the lawmakers was to preserve in their entirety the rights, immunities, and privileges enjoyed by certain classes of aliens in pursuance of existing treaties. That provision was not in the law as originally drafted (H. R. 6540, 68th Cong., 1st sess.). A copy of the bill as originally drafted had been referred to the Secretary of State for comment. On February 8, 1924, the Secretary of State wrote the Chairman of the Immigration Committee of the House, earnestly calling his attention to the fact that the bill, if enacted in the form in which it then stood, would be violative of existing treaties, and emphasizing the circumstance that the exemption in that bill in favor of aliens entering temporarily for business or pleasure [now clause (2) of section 3] was not sufficient to preserve all the treaty rights of aliens.

The bill had been reported to the House, however, before the letter of the Secretary of State was received. In order that such letter might be given proper consideration, the bill was recommitted by the House to its Immigration Committee; and when again reported to the House, the bill was accompanied by a report (H. R. Rep. No. 350, 68th Cong., 1st sess.), pointing out that since the receipt of that letter and other letters from the Secretary of State it had "been revised to meet as far as possible all of his suggestions as to administrative features," adding "this revision has occasioned so many changes * * * that it has been deemed advisable to reintroduce the bill which now becomes H. R. 7995. The new text, the Committee believes, meets all such suggestions fully." (Ibid., p. 2.)

In the report mentioned, *under the caption "Protection of Treaties,"* these further statements are found: "The Committee has incorporated in H. R. 7995 Secretary Hughes' proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation. * * * Your committee believes that this additional exemption * * * *is broad enough to take care of all the clauses of all our commercial treaties.* * * *." (Ibid., p. 3. Italics volunteered.) "The Committee believes that *the exemption of those entitled to enter under treaty provisions*, and the exemption of 'aliens visiting the United States as tourists, or temporarily for business or pleasure' fully satisfies treaty requirements." (Ibid., p. 4. Italics volunteered.)

It would be difficult to conceive of better or more convincing evidence of an intention to maintain the *status quo* with respect to treaty privileged persons than that

constituted of these positive assurances given to Congress by the Committee which reported the bill. Cumulative and, if possible, even more convincing evidence, however, is to be found in the record of the debates upon the bill, confining such references to statements made by Representatives or Senators who, because of their official connection with the drafting, reporting, or amending of the legislation, were in a position to speak with authority concerning the meaning of the provisions under consideration.

On April 5, 1924, Chairman Johnson of the House Committee, at the time in charge of the bill upon the floor of the House, made this statement: "I have already said this morning that this bill violates no treaty" (Congressional Record, Vol. 65, pt. 6, p. 5661), undoubtedly referring to his remarks of that morning to the effect that "We undertake to make full provision for all who may properly come to the United States as travelers or tourists on a temporary stay, *and all who may want to come in under any of the provisions of any treaty we may have with the other nations of the world.*" (Ibid., p. 5649. Italics volunteered.) Then, on May 9, 1924, Chairman Johnson said: "We have a fair bill. It takes care of all our relations with the nations of the world. *It protects every treaty with all the nations of the world.* It is absolutely fair." (Ibid., pt. 8, p. 8229. Italics volunteered.) Again "Of course there is a saving clause in the law that takes care of those entitled to be taken care of by the treaty. That is where so many misunderstand the Chinese treaty." (Ibid., p. 8233.)

In enacting this legislation, a separate bill (S. 2576) was passed in the Senate. Later this bill was merged with the House bill (H. R. 7995), this being done by a Conference Committee of the two Houses. The Senate

bill, when reported to the Senate by its Committee, contained nothing corresponding either to what is now subdivision (c) of section 13 or clause (6) of section 3. Senator Shortridge endeavored to have an amendment adopted placing in the Senate bill a provision similar to subdivision (c) of section 13 of the law as finally enacted, and also an amendment embodying the exception now found in clause (6) of section 3. Addressing the Senate on April 7, 1924, with special reference to the objections raised by the Secretary of State in his letter of February 8th, and the exemption proposed to meet those objections, Senator Shortridge said: "What Secretary Hughes feared was lest by this legislation we *offend against existing treaties. We have avoided that altogether in the bill.*" (Congressional Record, Vol. 65, pt. 6, p. 5743. Italics volunteered.) He also stated: "As the bill was first introduced into the other House * * * it did not contain the present provision covered by my amendment, which respects fully and unequivocally the treaty of 1911, so that neither Japan, *nor China*, nor Siam, nor any of the nations of the earth can object to our action if we adopt this measure *upon any suggestion that it is violative of any treaty of commerce and navigation.*" (Ibid., p. 5745. Italics volunteered.) If it were necessary to pursue this further, references might be given to other significant remarks made by Senator Shortridge (Ibid., p. 5746-5747, and Ibid., p. 6304), and to comments along similar lines made by Senator Reed of Pennsylvania, the author of the Senate bill, bearing upon the amendment eventually adopted by the Senate incorporating in its bill what is now clause (6) (Ibid., pp. 6315-6316); and to a colloquy between Senators Shortridge, McKellar and Reed (Ibid., pp. 5743-5745).

2. Judicial decisions concerning the exempting clause.

The status under the new law of wives and minor children of Chinese merchants has been considered by three District Courts, i. e., those for the Western District of Washington, the District of Massachusetts, and the Northern District of California.

Judge Neterer, in the first decision rendered [*In re Goon Dip, et al.*, 1 Fed. (2d), 811], pointed out that the courts had for more than a generation construed the treaty with China of 1880 as admitting the wives and minor children of Chinese merchants; and that the report of the House Immigration Committee and the express provisions of the new law clearly show that the intent of Congress was not to disturb the relations existing under the treaty and prior laws; and expressed the view that the new law, the treaty, prior laws, prior judicial construction of the treaty and laws, and the departmental construction, "must all be considered together, and under such consideration the court will be slow to assume that Congress intended to treat the treaty stipulations as a scrap of paper." (Citing *Chew Heong vs. United States*, 112 U. S. 536, and *United States vs. Mrs. Gue Lim*, 176 U. S. 459.)

In the second case (In re *Chin Hem Shu*, Civil No. 2833, Dist. of Mass., decided Dec. 11, 1924), Judge Lowell wrote no opinion, but followed the decision of Judge Neterer in the first case.

The third case is the one now at bar [2 Fed. (2d), 995]. In it Judge Kerrigan did not even refer to the previously rendered decision of Judge Neterer. He stated that his conclusions were reached with "difficulty and some hesitation." He also stated that, were it not for

the provisions of sections 5 and 25 of the new law, he "would find no difficulty in agreeing" with the contentions that the treaty with China of 1880 should be regarded as a treaty of commerce and navigation within the meaning of clause (6), section 3, that such treaty had been construed by the Supreme Court as admitting the wives and minor children of merchants, and that Congress had enacted clause (6) with the knowledge of such judicial construction.

Evidently Judge Kerrigan's attention was not called to the distinct nature of the two systems of exclusion set up by the act, hereinafter described (pp. 17-18, post), nor to the fact that sections 5 and 25 are in origin and purpose a part of the quota-visa system and cannot be applied to such a case as this without conflicting with the purpose of clause (6) to preserve treaty rights inviolate. His attention escaped the fact that to deny a merchant entitled to enter in pursuance of such a treaty the right to bring in his wife and minor children would be to obstruct the treaty; and he did not observe the principle that a liberal construction should obtain where the furtherance of the objects of a treaty is involved. Moreover, he overlooked the fact that the treaty of 1880 had been construed to admit the wives and children of merchants because they are themselves "of the merchant class;" and his attention, apparently, was not directed at all to the history of the legislation, as hereinbefore given.

POINT III

The Specific Exemption Favorable to Petitioners Is Not Nullified or Modified by Other Provisions of the Statute.

As already seen, the administrative officers have taken the view that these petitioners are excluded because it is provided by section 5 of the 1924 Act that aliens who are not specifically classified as non-immigrants or non-quota immigrants are not to be admitted as of those classifications "by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." Moreover, while no provision of the law other than sections 13 (c) and 5 were invoked against petitioners by the administrative officers, the last clause of section 25 was cited in the decision of the District Court. Therefore, it seems desirable briefly to comment upon section 25 as well as section 5.

1. The non applicability of Section 5.

It is conceived that there are two reasons why the view of the administrative officials concerning section 5 cannot logically be maintained.

In the first place, these wives and minor children of merchants are not asking to be admitted simply because they are related to other aliens who are admissible. Their claims to admission rest upon other and higher grounds than simply that. Being the wives and children of merchants—of men who are, by virtue of their status and occupation, entitled to enter pursuant to an existing treaty—these wives and children are themselves members of that permitted class, are themselves protected against exclusion by the new act because they are of a class heretofore judicially and administratively recognized as being entitled to enter in pursuance of our treaty with China. Nor do these wives and children seek admission simply as "being exempted from the operation of any

other law regulating or forbidding immigration;" for the exemption is not only from all other laws regulating or forbidding immigration, but, as has been shown, also from this present statute.

Secondly, section 5, by its caption, its text, and its origin and legislative history, is shown not to be inintended to apply to aliens whose exclusion under the terms of this statute is predicated upon their being "persons ineligible to citizenship," but only to aliens whose exclusion under the statute rests upon questions of status with respect to the quotas provided for countries other than those countries from which such aliens as the petitioners herein, persons ineligible to citizenship, emigrate to the United States.

The Immigration Act of 1924 sets up two systems, under one of which certain "immigrants" and under the other of which certain "aliens" are excluded. These may be described as the quota-visa system and the ineligible-to-citizenship system, respectively. It is apparent on the face of the statute that the provisions with regard to immigration visas are part and parcel of the provisions establishing quotas and specifying the method of their determination and their effects. Immigration visas are to be procured by immigrants, and issued by consuls, respectively, because the lawmakers have deemed that the best way of keeping accurate and current account of the reductions occurring from day to day in the various quotas, and of giving assurance that aliens claiming to be nonquota immigrants are indeed such. The question of the separateness of the ineligible-to-citizenship provisions from those relating to the quota-visa system is discussed in more detail in the brief submitted by the writer in pending case No. 770, *Chang Chan, et al., vs. John D. Nagle,* because that question is regarded as of more sig-

nificance and importance in that than in this case. Without going further into the matter here, the liberty is taken of referring to that brief, pp. 4-9.

The caption and text of section 5 clearly show that the authors of the legislation when incorporating that section in the statute had in mind solely aliens who fall within the quota-visa provisions. Its caption is "Quota Immigrants," and its text refers to quota-immigrants, non-quota immigrants, and non-immigrants; while section 13 (c) does not exclude simply immigrants, but excludes aliens "ineligible to citizenship." And these wives and children are not seeking admission as non-immigrants or non-quota immigrants, exempted from the operation of the quota-visa provisions of the law, but are seeking admission as the wives and children of men who belong to the treaty protected classes and therefore members themselves of such classes, and for that reason exempt from the provisions of the law which exclude persons ineligible to citizenship.

Moreover, the circumstance that the caption and text of section 5 show that that provision is intended to operate in connection with the quota-visa separate system of exclusion created by the act is corroborated, to a practical demonstration, by the legislative history of section 5. The ineligible-to-citizenship system of exclusion originated with the House Immigration Committee and appeared in the bill reported by that Committee (H. R. 7995). But so much of section 5 as is here under discussion originated with the Senate Immigration Committee, whose bill (S. 2576) contained nothing relating in the remotest degree to the ineligible-to-citizenship system. (See Sec. 3, S. 2576, p. 5, and Congressional Record, Vol. 65, pt. 6, p. 5418.) When the two bills had been passed by the respective Houses they were referred to a Commit-

tee of Conference, by which Committee their provisions were merged into the one comprehensive measure eventually enacted; and in that process of merging the provision under discussion was transferred, with unimportant textual changes, from its position in the Senate bill into section 5 of the act.

It seems apparent, furthermore, that the particular purpose of section 5 was to meet the decision of the Circuit Court of Appeals, Second Circuit, in the case *United States ex rel Gottlieb vs. Commissioner of Immigration,* 285 Fed. 295. That decision was not reversed by this Court until the very day on which the 1924 Act was approved by the President, to wit, May 26, 1924. (*Commissioner of Immigration vs. Gottlieb,* 265 U. S. 310.) As stated by Middleton Beaman, Esq., Legislative Counsel of the House of Representatives: "Some 8,000 aliens were admitted under a construction of the law by the Circuit Court of Appeals for the Second Circuit in the Gottlieb case, which case and cases following it held that the wives and children of persons exempt from the quota were themselves exempt." (American Bar Association Journal, July, 1924, pp. 490, 492.) In other words, the 1921 Quota Act had been so construed judicially as to admit aliens not particularly specified in such act as non-quota immigrants because such aliens were related to aliens so specified therein. It seems altogether logical, therefore, to conclude that the Senate Committee placed the provision in question in its act in order to guard against the possibility of the new law being construed in like manner.

2. The non-applicability of Section 25.

It is true that the House Immigration Committee had also incorporated in its bill a provision the obvious pur-

pose of which was to guard against a repetition of the judicial construction above mentioned. That Committee's provision is the second clause of the last sentence of section 25 of the bill (H. R. 7995) and of the act, which is to the effect that no alien admitted by any previous immigration law shall be admitted if excluded by any provision of the new act.

The petitioners herein not being, as already shown, persons "excluded by any provision of this act," clearly this clause of section 25 could not operate to exclude them. Moreover, the origin and history of the provision indicate that it was intended for another purpose; and to give it the force with respect to these petitioners which the District Court accorded it would be to throw it into absolute conflict with clause (6), section 3, the purpose of which, as already seen, is to preserve all treaty rights.

Obviously the House, like the Senate, was much concerned because of the fact that about 8,000 excess quota aliens had been admitted as the result of the Gottlieb decision. Inasmuch as there appeared nowhere else in the House bill any provision calculated to have the same effect as the Senate bill provision (section 5), and inasmuch as the provision of section 25 above described clearly is calculated to produce that same result, it can be logically and confidently assumed that the said provision of section 25 constituted the effort of the House Committee to meet the situation created by the Gottlieb decision. That decision had announced a principle under which a large number of quota aliens were admitted as exempt from the 1921 quota act because they had been enumerated as exempt from a previous immigration law; and the House Committee undertook to meet such situation by providing that under the new law no quota alien excluded thereby should be admitted as an exempt simply

because he belonged to a class exempted from the operation of some previous law. When it is remembered that this act did not follow the usual course of being reported by the House Committee, passed by the House, referred to and reported by the Senate Committee, and passed by the Senate; but that it is a composite measure passed practically simultaneously by the two Houses as separate bills, and then merged in Conference, the fact that these two provisions, intended and calculated to produce the same result, are now found in the law is no cause for wonder.

POINT IV

Upon the grounds hereinbefore stated, it is respectfully submitted that the question certified by the Circuit Court of Appeals, Ninth Circuit, should be answered in the negative.

Respectfully submitted,

A. WARNER PARKER,

Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

CHEUNG SUM SHEE ET AL., APPELLANTS
v.
JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO, APPELLEE
No. 769

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF THE APPELLEE

STATEMENT

The appellants in this case are the alien Chinese wives and minor children of Chinese merchants domiciled and resident in the United States. The appellants arrived at San Francisco from China on July 11, 1924, seeking to join their respective husbands or fathers in this country. On arrival, they were taken into custody by the appellee, Commissioner of Immigration, and were ordered excluded, under the provisions of sections 5 and 13(c) of the Immigration Act of 1924 (Act of May 26, 1924, c. 190, 43 Stat. 153). The order of exclusion was affirmed on appeal by the Secretary of Labor, and was sustained in *habeas corpus* pro-

ceedings by the District Court for the Northern District of California. The opinion of the court is reported in 2 F. (2nd) 995 (first case).

An appeal was taken to the Circuit Court of Appeals; and that court has certified the following question for determination here:

> Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?

It should be noted that this case involves an altogether different question from that which is involved in the case of *Chang Chan et al.* v. *Nagle,* No. 770, at the present term. The two cases were decided at the same time by the District Court; and the two have come at the same time on certificate to this Court. The present case involves the right of *Chinese wives of alien Chinese merchants* to enter this country; while *Chang Chan* v. *Nagle,* No. 770, involves the right of *Chinese wives of citizens of the United States.* The two cases turn upon different points of statutory construction, based upon different provisions of the Immigration Act of 1924; and in addition, the present case involves a consideration of treaty rights, while No. 770 does not. For these reasons it is important that the two cases should be kept distinct.

STATUTES INVOLVED

In the present case, we are concerned with the following provisions of the Immigration Act of 1924 (Act of May 26, 1924, c. 190, 43 Stat. 153).

> SEC. 13(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

Of the exceptions above noted, only one is directly in point here. That is the exception provided by section 3(6):—

> SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * *.
>
> (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

A further provision of the Act must also be noticed:

> SEC. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act

> as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

The Treaty with China of November 17, 1880 (22 Stat. 826, 827) provides:

> ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

It is conceded that this is a "present existing treaty of commerce and navigation," as contemplated by section 3(6) of the Immigration Act of 1924, *supra,* p. 3.

ARGUMENT

I

It will be observed that Article II of the Treaty of 1880, above quoted, speaks only of "Chinese merchants * * * *together with their body and household servants.*" No mention is made of their wives or minor children. Accordingly, for some

time, the lower Federal courts were in doubt as to the right of such wives and minor children to enter this country without the certificate required by section 6 of the Act of May 6, 1882, c. 126 (22 Stat. 58, 60), as amended by the Act of July 5, 1884, c. 220 (23 Stat. 115, 116).

The right of the wives and children to enter without certificates was upheld in the following cases:

In re Chung Toy Ho, 42 Fed. 398.
In re Lee Yee Sing, 85 Fed. 635.

The right was denied in the following cases:

In re Ah Quan, 21 Fed. 182.
Case of the Chinese Wife (*In re Ah Moy*), 21 Fed. 785.
In re Wo Tai Li, 48 Fed. 668.
In re Li Foon, 80 Fed. 881.

All doubts were set at rest, however, by the decision of this Court in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, in which it was held that the wife and minor children of a Chinese merchant domiciled in this country were entitled to enter and to join the head of their family without producing the required certificate. In this decision the Court construed the treaty as if it read:

> Chinese merchants, * * * together with their body and household servants [*wives and minor children*] * * * shall be allowed to go and come, etc.

The Court held that the wife and children partook of the status of the head of the family, and

were included in the spirit of the treaty, if not in its letter.

The question now before the Court is simply this: Has the decision in the *Gue Lim* case been affected by the enactment of sections 5, 13(c), and 3(6) of the Immigration Act of 1924, supra, pp. 3, 4? It is conceded that the appellants in this case would have had the right to enter this country, under the *Gue Lim* decision, prior to July 1, 1924, the date when the relevant sections of the Immigration Act of 1924 went into effect. It is suggested, however, that their right had been taken away by that Act, and that they must therefore be excluded.

At the outset it must be frankly explained that there is a difference of opinion between the two departments of the Government which are directly concerned with the administration of the Act. The Department of Labor is of opinion that the Act requires the exclusion of these appellants. The Department of State is of opinion that the Act and the Treaty together require their admission. The disagreement between the Departments thus focuses upon the extent to which treaty rights have been affected by the Act of 1924.

In view of the importance of this case, counsel for the Government feel it their duty to submit reasons in support of both opinions, in order that this Court may have the benefit of comparing them, and in order that it may not be compelled to

render a decision based upon a one-sided presentation of the case. Accordingly, in this brief is set forth the reasoning in support of the exclusion theory maintained by the Department of Labor. In the Appendix (*infra*, p. 13) are set forth the opposing arguments of the State Department, as embodied in a memorandum prepared by the Solicitor for that Department.

It must be added that the foregoing statement does not apply to the case of *Chang Chan* v. *Nagle*, No. 770, at the present term. That case, as has already been noted, turns upon a different point, and is treated in a separate brief.

II

It is conceded that the appellants in this case would formerly have been admissible under the *Gue Lim* decision. But we must now consider the effect of the Immigration Act of 1924, supra, pp. 3, 4.

The appellants are clearly "aliens ineligible to citizenship." They are therefore excluded by section 13(c) of the Act, unless they can establish their right to enter as "treaty merchants" under section 3(6).

Section 3(6) grants admission to "an alien entitled to enter the United States *solely to carry on trade* under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Can it be said that the wife or the minor child of a merchant comes here "*solely to carry on trade*"? The agent of a merchant is not himself entitled to enter as a merchant. *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 264. And this Court in the *Gue Lim* case did not hold that the wife of a merchant was entitled to enter "*solely to carry on trade.*" That case merely decided that she was entitled to enter solely to reside with her husband, as she then had the right to do. The purpose of section 3(6) was to take away that right by granting the right of entry only to actual merchants, and not, as formerly, to merchants and their families. Any other construction would deprive the section of its meaning. At the time when the *Gue Lim* decision was rendered, no statutory definition existed of the term "merchant"; and the Court accordingly construed the language of the treaty as including both merchants and their families. The Court might have decided the *Gue Lim* case differently had section 3(6) then been in existence.

An examination of the legislative history of section 3(6) is instructive. That section was inserted at the request of the Secretary of State, for the purpose of safeguarding treaty rights. But it must be noted that section 3(6) in its final form is very different from the provision which the Secretary originally suggested; and it is possible that the effect of the alteration is to exclude the wives and children of merchants.

The Committee Report states:

> The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 of an additional exempted class, to wit:
>
> "(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation."
>
> The original suggestion of Secretary Hughes was for an exemption in these words:
>
> "An alien entitled to enter the United States under the provisions of a treaty."
>
> Subsequently, the Secretary suggested the following words:
>
> "An alien entitled to enter the United States under the provisions of an existing treaty."
>
> The committee has incorporated in H. R. 7995 Secretary Hughes' proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.—68th Congress, 1st Session, House Report No. 350, pp. 2–3.

Whatever might have been the result had Congress enacted, *totidem verbis,* either of the Secretary's suggestions, it is submitted that the case must be judged upon the law as it is written. The Committee Report indicates that Congress in-

tended to "tie the exemptions to those persons properly exempted *and entitled to enter the United States solely to carry on trade* under and in pursuance of all existing treaties of commerce and navigation." The effect of section 3(6), as actually passed by Congress, may be to deny the right of entry to all who do not come here "*solely to carry on trade.*" It is doubtful whether this phrase can include the wife or child of one who comes to trade.

III

In opposition to this view counsel cite the case of *Anderson* v. *Watt,* 138 U. S. 694, 706, and other cases holding that the domicil of the husband is the domicil of the wife, and that the identity of the wife is, in a sense, merged in that of the husband.

But has not this theory lost much of its force since the enactment of the Act of September 22, 1922, c. 411 (42 Stat. 1021), under which the citizenship of the wife no longer follows that of the husband? And the Immigration Acts often operate to prevent husband and wife from residing together in this country. Yet this Court, when appealed to on the ground of hardship, has declined to interfere.

Commissioner of Immigration v. *Gottlieb,* 265 U. S. 310.
Chung Fook v. *White,* 264 U. S. 443.
Yee Won v. *White,* 256 U. S. 399.

IV

In the next place, it should be noted that section 5 of the Act (*supra*, p. 3) provides that—

> An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant *by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.* (Italics ours.)

It was upon this section that the District Court based its decision in the present case, being of opinion that Congress had, by this section, manifested its intention to exclude all persons having the status of the appellants. It may well be that the appellants have no right of entry in and of themselves; their right of entry is dependent, not upon their own status, but upon that of their husbands or fathers. And if that is so, then they are excluded by the operation of section 5.

V

It should also be noted that Congress has been careful to grant admission to the families of Chinese government officials [section 3(1)], and to the families of Chinese clergymen or professors [section 4(d); section 13(c) (2)]; and from this fact it may be inferred that Congress did not intend to grant admission to the families of Chinese mer-

chants, according to the maxim *Expressio unius est exclusio alterius.*

Lapina v. *Williams,* 232 U. S. 78, 92.
United States v. *Goldenberg,* 168 U. S. 95, 103.

VI

It is conceded that a strong presumption exists in favor of maintaining treaty rights. While a later statute may repudiate treaty obligations, such repudiation is not to be presumed, especially where considerations of humanity are involved. The right of these appellants to enter this country is a right conferred, if not by the letter of the treaty, at least by the treaty as interpreted by this Court. But it is submitted that even treay rights can not prevail against the language of the Immigration Act of 1924. And under Sections 5 and 13(c) of that Act, it is doubtful whether these appellants can enter.

Such is the contention of the Department of Labor; but this Court should also consider the careful and well-reasoned opinion of the Solicitor for the Department of State, before answering the question.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

APRIL, 1925.

APPENDIX

MEMORANDUM OF THE VIEWS OF THE DEPARTMENT OF STATE ON THE QUESTIONS RAISED IN THE CASE OF CHEUNG SUM SHEE ET AL. v. NAGLE

WIVES AND MINOR CHILDREN OF ALIEN MERCHANTS ENGAGED IN INTERNATIONAL TRADE AND COMMERCE ARE BY THE TERMS OF THE TREATIES OF COMMERCE AND NAVIGATION ACCORDED A RIGHT TO ENTER THE UNITED STATES

Wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter.

It may be noted in the first place that the courts of the United States, when interpreting the treaties of their country, act on the assumption that it was the design of the Contracting Parties not to contravene principles of morality and fairness;[1] that their agreement should be interpreted "in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose";[2] and that its terms should be liberally construed.[3]

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[1] *Ubeda* v. *Zialcita*, 226 U. S. 452, 454.

[2] Mr. Justice Brown, in *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." *Geofroy* v. *Riggs*, 133 U. S. 258, 271.

[3] Declared Mr. Justice Butler in the Opinion of the Court in *Asakura* v. *Seattle*, 265 U. S. 332, 342: "Treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Geofroy* v. *Riggs*, supra, 271; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437."

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There is thus imputed the best of faith to the High Contracting Parties. This attitude of the courts gives recognition to the only intelligible theory on which enlightened states could be deemed to conclude treaties with each other. While it indicates no peculiar rule of construction, it establishes the plane from which problems of treaty interpretation must always be approached, and the spirit in which search for the ultimate fact—the actual design of the Contracting Parties—must be made.

The commercial treaties of the United States providing for the entrance and residence of nationals of one Contracting Party into the territories of the other for the purposes of trade have not made mention of the wives and minor children of such individuals. It seems to have been taken for granted that there is such unity of interest in the individual family that the head thereof, if given the right to enter a country for purposes of trade, is the representative of an entity embracing his wife and children who are not to be dissociated from him. This conclusion is fortified by the fact that treaties with Japan, China, and other countries contemplate prolonged and undetermined residence for the purposes of trade, the occupation of dwellings, and by necessary inference the establishment of homes.

In considering the various treaties of commerce and navigation which have been concluded by the United States with various foreign powers, it is necessary to note in the first place that, while there is considerable variation in the language employed, the general intent and purpose of all such treaties is the same. To illustrate, the Treaty of Friendship, Commerce and Navigation with the Argentine

Republic, signed July 27, 1853 (10 Stat. 1005, 1006), contains in Article II the following language:

> * * * The citizens of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all places, ports, and rivers in the territories of either, to which other foreigners, or the ships or cargoes of any other foreign nation or State, are, or may be, permitted to come; to enter into the same, and to remain and reside in any part thereof, respectively; to hire and occupy houses and warehouses, for the purposes of their residence and commerce.

Article I of the Treaty of Commerce and Navigation with Belgium, signed March 8, 1875 (19 Stat. 628, 629), outlines the rights of the contracting parties "whether established or temporarily residing" in the territories of the other.

Article III of the Treaty of Peace, Friendship, Commerce and Navigation with Bolivia, signed May 13, 1858 (12 Stat. 1003, 1005), states that: "The citizens of either republic may * * * reside in all parts of the territory of either, and occupy dwellings and warehouses."

Article II of the Treaty of Friendship, Commerce and Navigation with Costa Rica, signed July 10, 1851 (10 Stat. 916, 917), provides that: "The subjects and citizens of the two countries, respectively, shall have liberty * * * to remain and reside." This last phrase is also used in Article I of the Convention of Commerce and Navigation with Great Britain, signed July 3, 1815 (8 Stat. 228), and in Article II of the Treaty of Friend-

ship, Commerce and Navigation with Honduras, signed July 4, 1864 (13 Stat. 699, 700). The words " sojourn and reside " are used in Article I of the Treaty of Commerce and Navigation with Italy, signed February 26, 1871 (17 Stat. 845, 846), and also in the Treaty of Commerce and Navigation with Norway-Sweden, signed July 4, 1827 (8 Stat. 346).

It would scarcely be suggested that each of these treaties should be interpreted differently in accordance with the exact words used. Such literal construction could not give effect to the intent of the contracting parties, nor could it avail to carry out the general purposes for which such treaties are concluded. It is believed that the varying terms of all these treaties may be properly paraphrased thus:

> The contracting parties agree that their citizens and subjects, respectively, shall have a right to come into the territories of the other for the purpose of carrying on international trade, and they are accorded the privilege of remaining indefinitely in the country, of establishing their homes and of bringing with them for this purpose the members of their families so long as they are here for that purpose.

The right of " treaty merchants " to bring with them their families follows as a necessary consequence upon their right to establish themselves in the country.

It may also be observed in this connection that although treaties are commonly referred to, as a matter of convenience, by so-called "titles," these " titles " are unofficial and can not be used as a

basis in classifying a particular convention as a "treaty of commerce and navigation" as that phrase is used in Section 3(6). Strictly speaking, a treaty has, as a rule, no legal "title," although some treaties contain in the preamble phrases descriptive of the treaties which might be regarded as legal titles or captions. Thus, the preamble to the treaty of February 21, 1911, with Japan (37 Stat. 1504), states that the United States and Japan "have resolved to conclude a Treaty of Commerce and Navigation," and the President's Proclamation of April 5, 1911, concerning this treaty (37 Stat. 1504) begins, "Whereas a Treaty of Commerce and Navigation." Although capital initials are used, these phrases may be regarded as descriptive merely. An examination of the original signed copy of the treaty of 1880 with China, in the archives of the Department of State, reveals that there is nothing therein which can be regarded as a title, although in Malloy's compilation (Vol. 1, p. 237) it is given the caption, "Immigration Treaty."

In so far as the Chinese treaty refers to merchants, and provides for their entry into the United States, it seems entirely reasonable and proper to consider it as a "treaty of commerce and navigation," because it may be taken to have been the design of the contracting parties that Chinese merchants should be permitted to enter as such for purposes of trade, just as merchants of other states have by treaty been given a similar right to enter the United States. There are also a number of treaties with Central and South American states which are called "Conventions for the Develop-

ment of Commerce by Facilitating the work of Traveling Salesmen." Such treaties accomplish a purpose similar to that of the general treaties called " treaties of commerce and navigation " and evidently come within the spirit of Section 3(6). The treaty of July 3, 1902, with Spain (33 Stat. 2105) is captioned " Treaty of Friendship and General Relations," but the language of Article II is not to be distinguished from that of many other commercial treaties. It would seem to be obviously improper to place dependence upon the unofficial captions of a compilation rather than upon the substance of the treaties themselves. It is only the latter consideration which can fairly meet the intent of the Immigration Act.

When the various treaties of commerce and navigation were concluded it was well known to the contracting states that requirements of traders and importers demanded the extended sojourn of nationals of one country in the territory of the other as a necessary incident of the business of firms engaged in international trade between the territories of the contracting parties. Corporations engaged in international trade usually require the presence of commercial representatives in another country for prolonged and indefinite periods. This feature of international trade is a common incident of our commerce with almost every foreign country. Definite restriction of it would menace the welfare of a trade which the United States is zealous to maintain; and the harm to it from the restriction applied to alien traders in our own country would be as vital as if the restriction were to be applied conversely to American representatives abroad.

It would be unreasonable to assume in the absence of convincing evidence that the United States and Japan, for example, sought, on the one hand, to give traders the right to enter, remain, and reside for an indefinite period for the purposes of trade, and, on the other, to isolate them while exercising that privilege from their wives and minor children.

An important social policy well recognized in the Anglo-American system lies at the foundation of this principle. Our courts have recognized the identity of interest which exists between husband and wife. The wife is an integral part of the husband's sphere of activity. In *Anderson* v. *Watt,* 138 U. S. 694, 706, the Supreme Court referred to previous decisions of the same tribunal and said as to husband and wife "the domicile of the husband is her domicile." This rule, the Court said, is "founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail." Therefore, because the family does exist as a single united entity, it may, in a broad sense, be said that the wife's purpose is the husband's purpose, and if the husband comes to the United States to carry on trade, his wife comes for that same purpose.

The Supreme Court of the United States in deciding the *Gue Lim* case[4] interpreted the treaty between the United States and China of November 17, 1880 (22 Stat. 826), in a manner that sustains

[4] *United States* v. *Mrs. Gue Lim,* 176 U. S. 459.

this conclusion. Mr. Justice Peckham, in the course of the opinion of the Court, said (176 U. S. 459, 466):

> And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty.[5]

Referring to prior conflicting decisions of the lower Federal Courts, Mr. Justice Peckham says further (p. 464):

> It is not necessary to review these cases in detail. It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge Deady. *In re Chung Toy Ho,* 42 Fed. Rep. supra.

In that case Judge Deady said (42 Fed. 398, 399):

> It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to

[5] It is not believed that the distinction drawn by Mr. Justice McReynolds in *Yee Won* v. *White*, 256 U. S. 399, with respect to *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, has any bearing on the present discussion, or that the learned Justice sought to minimize the effect of the language quoted in the text above.

> the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children.[6]

In the case of *Ex Parte Goon Dip,* 1 F. (2nd) 811, arising under the Act of 1924, Judge Neterer, of the District Court of the Western District of Washington, N. D., held that the wife and minor son of a domiciled Chinese merchant were admissible under the provisions of Section 3 (6) of the Immigration Act of 1924, since by the Chinese treaty of November 17, 1880, such wife and child were accorded a right of entry. *U. S.* v. *Mrs. Gue Lim,* 176 U. S. 459, and *In re Chung Toy Ho,* 42 Fed. 398, are cited in support of this proposition.[7]

The same judge in *Ex Parte So Hakp Yon,* 1 F. (2nd) 814, held that the wife of a resident Japanese merchant was not admissible for the reason that the Japanese Treaty of 1911 did not give to such wives a right analogous to that conferred upon the wives of Chinese merchants by the Chinese Treaty of 1880. The attempted distinction is based upon the fact that the Chinese Treaty includes the words "merchants * * * together with their body and household servants," while the Japanese Treaty does not contain this exact language. The argument is that if servants were admitted, wives, though not expressly named, were also admitted *a fortiori.* This distinction between

[6] See also *Yee Won* v. *White,* 256 U. S. 399, 401. In *Woo Hoo* v. *White,* 243 Fed. 541, 543, the Circuit Court of Appeals for the Ninth Circuit said: "It is well settled that the terms of that treaty confer upon a Chinese merchant domiciled in this country the right to bring his wife and minor children into the United States."

[7] See also *In re Chin Hern Shu,* D. C. Mass., Dec. 11, 1924 (unreported).

the two treaties is believed to be unsound. The Supreme Court in the *Gue Lim* case does not rest its decision upon this language of the Chinese Treaty, but upon the theory of the identic domicile of husband and wife and the design of the contracting parties. As already pointed out, the design in concluding the various treaties of commerce and navigation is similar in all such treaties and contemplated that merchants should not be separated from their families. This is the fundamental purpose of all treaties of this description.

For these reasons it is believed to have been the design of the Contracting Parties in concluding the treaty of 1880 and other commercial treaties, to permit traders to whom was given the right to enter and reside, the right to bring with them their wives and children; or, to express it differently, such individuals and their wives and children have a treaty right to enter and reside as a necessary incident to the trade which the treaty contemplates.

THE MEANING OF SECTION 3 (6)

Before attempting to construe the language of the Act it is necessary to emphasize the well-established rule of construction, which has been frequently enunciated by the Supreme Court, that it is never to be supposed that an Act of Congress overrides the provisions of a treaty unless its words are so clear that there is no escape from that conclusion. Declared Mr. Justice Harlan in the opinion of the Court in *Chew Heong* v. *United States,* 112 U. S. 536, 539, 540:

> * * * The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with

> the government of another country * * *. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.[8]

The Immigration Act of 1924 must therefore be approached with this principle in mind. Only the clearest and most explicit language would warrant imputing to Congress an intent to violate our treaties, i. e., an intent to exclude the wives and minor children of "treaty merchants." On the other hand, a weighty presumption is thrown into the scales in favor of a construction which respects our treaties.

Passing, then, to a consideration of the terms of the Immigration Act of 1924, it is noted that Sec-

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[8] The foregoing statement was quoted by Mr. Justice Peckham in the opinion of the Court in *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, 465, where it was said: "It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty."

See also *Ex Parte Webb*, 225 U. S. 663, 683; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221; *Devlin on the Treaty Power*, Section 176.

tion 3(6) of the Act classifies as a nonimmigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of Commerce and Navigation." Section 13(c) provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3."

If we assume that aside from the Act wives and minor children of merchants are given by the treaty a right to enter the United States, it is obvious that no argument for their exclusion under the act could arise except for the words "solely to carry on trade," which appear in Section 3(6). The argument is made that since wives and minor children do not carry on trade, they are not nonimmigrants and are excluded by force of the provisions of Section 13(c). It is argued that this phrase in Section 3(6) was directed against the wives and children of merchants, on the ground that any other construction deprives this phrase of all meaning. However, such is not the case.

It is common knowledge that when the then proposed Immigration Act was before the House Committee on Immigration, Secretary Hughes wrote to Representative Johnson, Chairman of that Committee, on February 8, 1924 [Cong. Rec., vol. 65, part 6, p. 5810], stating *inter alia* that he did not believe that the present subdivision (2) of Section 3 of the then proposed Act providing for the temporary admission of aliens for business or pleasure fully met our treaty obligations. It is also common knowledge that the debates in Congress upon the rights of aliens under existing treaties centered around the treaties relating to Japanese,

and particularly to the so-called Gentleman's Agreement. The debates further disclose that Senator Shortridge, who proposed and sponsored the amendment which is now Section 3(6) of the Act, was emphatic in asserting that his proposed amendment preserved to Japanese all rights which they had under the treaty of 1911. But he also indicated that it was not proposed to recognize the Gentleman's Agreement, the terms of which had not been disclosed to the Senate and which they feared allowed more extensive entry of Japanese than they desired to concede.

In this connection attention is called to the following quotations from the debates in the Senate when the present subdivision (6) of Section 3 was being discussed. It will be noted that the remarks quoted are those of the late Senator Colt, Chairman of the Senate Immigration Committee, and of Senator Shortridge, proposer of an Amendment putting the treaty exemption into the form which it now has.

[Congressional Record, 68th Congress, 1st Session, Vol. 65, Part 6]

Page 5416.

> Mr. COLT. If you will dwell on what is held to be an "immigrant," I think it will help you. I have already said that *under the trade treaties relating to commerce those who come over as traders are not "immigrants." The gentlemen's agreement relates to laborers, and hence to immigrants.* The Secretary of State objected, so far as the House bill is concerned, first, upon the ground that it violated the treaty, because it only admitted aliens here temporarily, and therefore was not broad enough to cover

traders, and, secondly, that it violates the gentlemen's agreement. Thereupon the House in their amended bill, among the excepted classes, excepted those coming in under present treaties. *Now, mind you, the treaty class are not strictly immigrants, and therefore a mere phrase* excepting those coming in under a treaty would cover the treaty with Japan, but would not cover the gentlemen's agreement.

* * * * *

Mr. SHORTRIDGE. Mr. President, begging the indulgence of the Senator from Rhode Island for a moment, before we turn from the subject, I wish not to be misunderstood. I have made the statement, and I venture to repeat it, that the amended bill of the House does meet the objection that the contemplated exclusion of aliens ineligible to citizenship violates an existing treaty. I state that not idly or impulsively, but deliberately. It meets that objection; *all those who are admissible into this country under any existing treaty of commerce and navigation are to be admitted under this act. But it is also true that there is a so-called gentleman's agreement, which never was a treaty, is not a treaty, and which has failed of its purpose.*

* * * * *

Page 6304.

Mr. BAYARD. *The amendment which the Senator now offers to the pending bill will operate to prevent the continuance of that gentlemen's agreement?*

Mr. SHORTRIDGE. *It will have that effect.*

Mr. BAYARD. That is the opinion of the Senator?

Mr. SHORTRIDGE. Yes.

Mr. BAYARD. And it is for that purpose that it is put in?

Mr. SHORTRIDGE. Yes. *The proposed committee amendment to the Senate bill seeks to perpetuate this agreement. The House bill has already eliminated it utterly. I propose that the Senate shall do likewise.* [Italics ours.]

* * * * *

It is therefore believed that the phraseology of Section 3(6) was adopted with a desire to grant full rights to persons entitled to enter under treaties of commerce and navigation. As has already been demonstrated, wives and children have such a right of entry. In other words, this phraseology was adopted to show that the treaty provisions referred to were only those provisions respecting privileges of commerce and navigation, and that the class of persons referred to was the merchant class within the scope of those provisions.

There is another apparent reason for the use of the phrase " solely to carry on trade " as used in Section 3(6). The various treaties of commerce and navigation do not refer exclusively to merchants. A right of entry is also accorded to ships (and necessarily to their crews) and to temporary visitors. For example, the Treaty of Peace, Friendship, Commerce, and Navigation with Bolivia, signed May 13, 1858 (12 Stat. 1003, 1005), provides in Article III that " The citizens of either republic may frequent with their vessels all the coast, ports, and places of the other, where foreign commerce is permitted " and " shall also have the

unrestrained right to travel in any part of the possessions of the other." Article I of the Treaty of 1911 with Japan (37 Stat. 1504), also grants liberty of "travel," as does Article I of the Convention of October 14, 1881, with Serbia (22 Stat. 963). The Convention of November 25, 1850 with Switzerland (11 Stat. 587, 588) grants liberty to "come, go, sojourn temporarily." Congress had already provided for alien seamen in Section 19 of the Act and for visitors or travelers in Section 3(2) thereof. As already noted above, it was originally believed by the framers of the bill that Section 3(2) sufficiently covered those entitled to enter under the treaties until Secretary Hughes indicated his contrary opinion in his letter of February 8, 1924, to Representative Johnson. It seems that Congress was intent on putting in a new provision to cover merchants, and it was with this in view that they inserted the phrase "solely to carry on trade" under the treaties. In other words, the phrasing of Section 3(6) seems to have been adopted partly to avoid a conflict with or repetition of Sections 3(2) and 19, and was designedly supplemental thereto.

That Congress did not intend to exclude wives and children of merchants who themselves had a right under the treaties to enter the United States is amply shown by the remarks of Senator Shortridge in supporting his amendment (the present Section 3 (6)) on the floor of the Senate.

In this connection it may first be noted that where the words of an Act are ambiguous, the Supreme Court will be aided in seeking the intent of Congress, not, it is true, from the merely general debates, but from the statements of those who

framed or introduced the legislation and from Committee reports. In *Caminetti* v. *U. S.* (1917), 242 U. S. 470, 490, the Supreme Court said: "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation." In *Duplex Printing Press Company* v. *Deering* (1921), 254 U. S. 443, 474, the court rejected the debates but said: "Reports of committees * * * stand upon a more solid footing and may be regarded as an exposition of the legislative intent * * * and this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage." See also *Wisconsin R. R. Commission* v. *C., B. and Q. R. R.* (1922), 257 U. S. 563. The remarks of Senator Shortridge, as the member who introduced and sponsored this part of the Act, are believed to be entitled to be received as evidence of the intent of Congress in regard to this provision. His statements explaining the purpose of his amendment are therefore quoted here:

[Congressional Record. 68th Congress, 1st session, Vol. 65, Part 6]

Page 5416.

Mr. SHORTRIDGE. I answer the Senator that it is not my purpose, it is not the purpose of anyone in sympathy with me, to violate any existing treaty; wherefore—

* * *.

Mr. ROBINSON. Let us get right down to this. Does the Senator mean to say that if his amendments are violative of a treaty with Japan, or would have the effect of abro-

gating it, he would not propose the amendments, but would withdraw them?

Mr. SHORTRIDGE. I answer thus: I can imagine a situation where we would be justified in legislating as we did in respect to the treaty with China. The Congress of the United States passed an exclusion law aimed at that country, full, direct, in the face of a then-existing treaty. I do not offer that as a worthy precedent to be followed, but in this case I have taken the trouble to say that we have sought to avoid that entirely.

Mr. ROBINSON. I understand that very well. You would much rather not abrogate the treaty.

Mr. SHORTRIDGE. Certainly not.

* * * * *

Page 5743.

Mr. SHORTRIDGE. What Secretary Hughes feared was lest by this legislation we offend against existing treaties. We have avoided that altogether in the bill.

Page 5744.

Mr. SHORTRIDGE. * * * I think, as I said the other day, that the Secretary of State will now see clearly that we do not propose in this bill in anywise to modify, annul, or disregard the provisions of the treaty of 1911.

* * * * *

Mr. SHORTRIDGE. By the amendment which we put in, in addition to all who may come in under the treaty of 1911—and there is no

limit to the number who may come pursuant to the provisions of that treaty.

* * * * *

Mr. McKellar. *The Senator says that students and ministers of the Japanese church and traders may come and may stay ad libitum. Do I understand there is no limit put upon those three classes at all, and their families? Would not that let in a very large body of men and women?*

Mr. Reed of Pennsylvania. If it would be of any assistance to the Senator, I have the language of the treaty here. It is quoted by Secretary Hughes in his letter.

Mr. Shortridge. I should be glad to quote the words of the treaty. *Undoubtedly there is no limit as to the number of those admissible under that treaty.* That was one of the reasons why former President Roosevelt was so indignant over that treaty of 1911, as I will point out in a moment. There is no limit set as to the number. * * *

Page 5745.

Mr. Shortridge. Yes; I will put them into the Record. I suggest to the Senate that there is presented a situation which is charged with unrest, with friction, and with danger. Our Secretary of State in the performance of his duty, of course, was particularly concerned with this legislation. As the bill was first introduced in the other House—I beg Senators to note this, if they will—it did not contain the present provision covered by *my amendment, which respects fully and unequivocally the treaty of*

1911, so that neither Japan nor China nor Siam nor any of the nations of the earth can object to our action if we adopt this measure upon any suggestion that it is violative of any treaty of commerce and navigation.

Page 5746.

Mr. SHORTRIDGE. The first objection is advanced more by our own people than by them. It is said that we violate the treaty obligations of this Republic. So, *once for all, that the most stupid or perverse-minded man elsewhere may understand it—every Senator understands now that we do not, but in order that the most stupid or perverse-minded man elsewhere may understand it—let me say that we have proposed specifically to recognize the existing treaty of commerce and navigation with Japan. Whatever rights are guaranteed to Japan under that treaty are to remain.* We are not disposed to question the terms of the treaty. There it is. This Nation has set its hand to it. There is the treaty, and there let it be, and let it be observed. *So let us have done with puerile discussion elsewhere that we propose to trample upon an American treaty. Far from it. We lift it up; we stand by it; and we are only anxious that Japan shall stand by it and observe it.* * * *

Page 6304.

Mr. SHORTRIDGE. * * * To remove any doubt which may be in the mind of a thoughtful Senator *I repeat again and yet again that*

it is not the purpose of the House bill, it is not the purpose of the proposed amendment, it is not my purpose, and it is not the purpose of any of those who favor this exclusion policy to violate in any degree any such existing treaty. I may observe that that treaty admits an unknown number for the purposes specifically in the treaty set out. So that—and this question has been put to me by other thoughtful Senators—it should be understood by us, of course, and once and for all, that *there is no disposition to violate any existing treaty such as is described in the House bill or in the proposed amendment.* [Italics ours.]

This same desire and intent to uphold our treaty obligations are also amply proved by the following quotations from pages 2, 3, and 4 of the Report of the House Committee on Immigration, accompanying the introduction of the "Johnson Bill," H. R. 7995.

[Report No. 350, H. R., 68th Congress, 1st session. March 24, 1924]

Protection of Treaties.—The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 (p. 5) of an additional exempted class, to wit:

"(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

The original suggestion of Secretary Hughes was for an exemption in these words:

"An alien entitled to enter the United States under the provisions of a treaty."

Subsequently, the Secretary suggested the following words:

"An alien entitled to enter the United States under the provisions of an existing treaty."

The Committee has incorporated in H. R. 7995 Secretary Hughes's proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.

The committee agrees with Secretary Hughes that immigration and the regulation thereof is a domestic matter.

The control of immigration belongs to the Congress of the United States. Your committee feels that this additional exemption does not pass that control from Congress, and feels also that it is broad enough to take care of all of the clauses of all our commercial treaties, including that with Japan, which has been specifically mentioned in the exchange of letters between the State Department and the committee.

The Secretary of State, by the very nature of his office, must guard our treaties with other nations. In fairness, the Secretary of State must present the views of other countries to the committees of Congress which have to do with the framing of legislation which may affect other nations or the relations of the United States with other nations.

> The House Committee on Immigration in turn has felt obliged to go just as far as it could in an effort to meet the views of Secretary Hughes with reference to treaties in connection with the effort to accomplish a restriction of immigration.
>
> * * * * *
>
> The committee believes that the exemption of those entitled to enter under treaty provisions, and the exemption of "aliens visiting the United States as tourists or temporarily for business or pleasure" fully satisfies treaty requirements.

Having established that the various treaties of commerce and navigation confer upon the wives and minor children of merchants engaged in international trade and commerce, a right to enter the United States with their husbands and fathers, and having shown that this right was recognized and preserved by Section 3(6) of the Immigration Act of 1924, it is proper to consider the reasoning of those who are inclined toward a contrary construction of the statute and treaties.

POSITION OF THE DEPARTMENT OF LABOR

The contentions of the Department of Labor are set out in Acting Secretary White's letter of October 24, 1924, to the Secretary of State. He bases his interpretation on two portions of the Immigration Act of 1924. First, he says:

> I am not, however, convinced that the conclusions reached in your letter have given sufficient effect to the language of clause 6 of Section 3 of the Immigration Act of 1924,

> which appears to me to cover not every alien who is entitled to enter under the treaty of commerce and navigation, but only such of those aliens as enter solely to carry on trade under and in pursuance of the provisions of such a treaty, which can not be truly said of the wife and minor children coming merely as such with the husband and father, although he himself may be entering for that purpose.

This is nothing short of a blunt assertion that Congress undertook to cut off rights conferred by treaty. Unless such an imputation is supported by evidence, it should not be treated seriously, for it contradicts the sound canon of construction above noted whereby the Supreme Court always presumes that Congress has no design to violate an existing treaty of the United States. Moreover, in the present case, this contention is valueless, because the evidence is convincing that Congress did in fact, after discussion of the matter, endeavor to respect the treaty obligations of the nation.

Second, he says:

> I am also not convinced that sufficient effect has been given to Section 5 of that Act, which appears to me to declare so definitely that no alien shall be admitted as a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other regulation or law forbidding immigration that I feel there is no room left for construction.

The gist of this contention is that wives and children of merchants not being admissible in their own right, are expressly excluded by Section 5, which provides "an alien who is not particularly specified in this Act as a * * * nonimmigrant shall not be admitted as a * * * nonimmigrant by reason of relationship to any individual who is so specified."

The answer to this contention depends upon two things: first, the meaning of the appropriate treaty provisions; and second, the meaning of Section 3(6). If the treaty gives the wives and children of merchants a right to enter the United States, and if Section 3(6) stipulates that anyone having a right under the treaties is a nonimmigrant, then it may be said that wives and children are so particularly specified in that Section. These points have, it is believed, already been established above, but it is pertinent to note that the phrase "particularly specified," as used in Section 5, is necessarily an expression of greater generality than the words themselves would imply. If we turn to Section 3(6) we find that it says merely "*an alien* entitled to enter," etc. No particular persons are specified. The Section does not include the words "a merchant" or "a business man" or "an alien man" or similar specific designations. It merely says "an alien." The other qualifying words have been discussed above and it has been shown that they do not limit the class included in this provision to the merchants themselves. The persons "particularly specified" in Section 3(6) are "aliens" who are entitled to enter for commercial purposes under the treaties. "An alien" may be a man, woman, or minor child, and any one of these

may therefore be said to be "particularly specified."

If wives and children of merchants enter by virtue of a right granted by the treaty, Section 5 is not applicable, because Section 5 refers to persons whose sole claim to a right of entry is based on relationship. It has no reference to persons whose treaty right is expressly recognized by the terms of some section of the Act, and therefore has no reference to these wives and children whose right of entry—as has been demonstrated—is recognized by Section 3(6).

POSITION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION, IN DECIDING THE PRESENT CASE

The basis for the Court's decision is to be found in 2 F. (2nd) 995, at page 997.

The Court says:

> As already pointed out, the treaty of 1880, while permitting "teachers, students, [and] merchants together with their body and household servants" to enter, does not in terms permit their wives and children to do so, and their entry has been so far sanctioned by virtue of their relationship to a member of one of those classes. The present act designates such merchants as nonimmigrants, and the provision alluded to, to the effect that an alien who is not particularly specified in the act as a nonimmigrant shall not be admitted as such by reason of relationship to any individual who is so specified, seems to me to be directly pointed at persons in the situation of these petitioners.

While it is not wholly clear what the Court had in mind, an analysis of the judicial reasoning is unnecessary, because the Court has evidently failed to grasp the essential points which must be borne in mind in interpreting the Act. The Court does not consider the treaty itself and consequently can not authoritatively conclude whether there is a conflict between the treaty and the statute. If such a conflict exists or if it is suspected, it is the primary duty of the Court to see whether the two can be reconciled. To fail in this duty is to assume that Congress intended to violate the treaty, whereas, as has been noted, the Supreme Court has repeatedly stated the principle that the presumption is in favor of the treaty and emphatically in its favor. But here there is no conflict; the treaty gives a right and the statute recognizes and confirms the right.

It is believed that the Court could not have reasoned as it did if it had grasped the significance of the Supreme Court's interpretation of the Chinese treaty in the *Gue Lim* case. The Supreme Court did not inject the wives and children of merchants into the treaty; it found that these persons were already within the treaty. Once the treaty has been authoritatively interpreted—that is, when it is known what the treaty means, what is its scope, what persons are included within its terms—this question is settled. It is no longer pertinent to inquire what reasoning was employed by the Supreme Court in reaching its decision. The element of relationship was, of course, considered by the Supreme Court in deciding what the treaty meant—for what purposes the contracting parties concluded such a convention. But relationship was merely an element of interpretation and not

the basis of the right. The contracting parties conferred the right by concluding a treaty which permitted an international merchant to reside indefinitely in this country *with his family.* When the question first arose, the meaning of the treaty was not apparent. The Supreme Court interpreted the treaty and found that the contracting parties had given to the wives and children, as well as to the merchants themselves, a right to enter and reside. It is no longer necessary to ask why the wives and children are in the treaty; it is necessary only to realize that they are within its scope. Although this point has already been discussed in this memorandum, it may be useful to repeat that Section 3(6), under a proper interpretation, is seen to specify that wives and children of merchants are nonimmigrants. They are nonimmigrants because Congress intended by this subdivision to classify as such "any alien" who, in the interests of international trade, had, under our treaties of commerce and navigation, a right to enter. Since such wives and children were given that right by treaty they are included within the provisions of Section 3(6), and therefore Section 5 is inapplicable by its very terms, since it refers only to aliens not particularly specified in the Act.

It may be noted that the Court, unlike the Department of Labor, does not discuss the wording of Section 3(6) in this connection, but on the contrary says in another place [2 F. (2nd) 995, 997]:

> It is admitted by the respondent that it [the rule laid down in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, admitting wives and children under the old Act] would be appli-

> cable in this case were it not that the Immigration Act of 1924 contains provisions which effectually preclude its further observance, *namely, Section 5 and subdivision (c) of Section 13 thereof.* [Italics ours.]

The question then resolves itself into the inquiry whether these persons have a right under the treaty. An affirmative answer to this inquiry has already been made.

SUMMARY

By way of summary, the following points are emphasized:

First. For reasons which are hereinabove set forth, and which have had the support of the Supreme Court of the United States, the wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter.

Second. If such wives and minor children are clothed with a treaty right to enter, it must be presumed that Congress had no desire to impair that right.

Third. The evidence is abundant and convincing that Congress itself not only had no desire to curtail that treaty right, but also deliberately undertook to respect the treaty right to enter of all who were clothed therewith.

Fourth. Inasmuch as the wives and minor children of alien merchants possess by treaty a right to enter, they fall within the reasonable scope of Section 3 (6) of the Act, and consequently remain unaffected by any provisions of Section 5 thereof.

CONCLUSION

In conclusion, emphasis must again be laid on the seriousness of the situation which would develop, if, in addition to the restrictions upon immigration which Congress had the right to impose, it should be found that Congress by its legislation had violated a treaty right heretofore sustained by the Supreme Court of the United States to the prejudice of the rights of foreign traders and of the interests of our own commerce. It is earnestly urged that there is no provision of the Act which compels us to face such a situation.

CHARLES CHENEY HYDE,
Solicitor for the Department of State.

FEBRUARY 18, 1925.

Approved by the Secretary of State, February 19, 1925.

CHEUNG SUM SHEE ET AL. *v.* NAGLE, COMMISSIONER OF IMMIGRATION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 769. Argued April 17, 20, 1925.—Decided May 25, 1925.

1. Alien Chinese wives and minor children, of Chinese merchants lawfully domiciled in the United States, are not mandatorily excluded from admission by the Immigration Act of 1924, which provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien is . . . not an immigrant, as defined in Section 3", and in that section classifies as a non-immigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." P. 344.
2. Such wives and children were guaranteed the right of entry by the Treaty of 1880. *United States* v. *Mrs. Gue Lim*, 176 U. S. 459. *Id.*
3. The Act of 1924 should be construed with a view to preserving this treaty right; and the legislative history and general terms of the act permit this. P. 345.
4. Such aliens, being in effect specified by the act itself as "non-immigrants", are not barred by § 5, which declares that an alien not particularly specified in the act as a non-quota immigrant or non-immigrant shall not be admitted as such "by reason of rela-

tionship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." P. 346.

QUESTION certified by the Circuit Court of Appeals, arising on the review of a decision of the District Court, (2 Fed. (2d) 995,) which refused relief by *habeas corpus* to Chinese aliens held for deportation by the immigration authorities.

Mr. Frederick D. McKenney and *Mr. George A. McGowan*, with whom *Messrs. John L. McNab, Jackson H. Ralston, Roger O'Donnell, George W. Hott, W. J. Peters, M. Walton Henry, J. P. Fallon, O. P. Stidger, W. G. Becktell*, and *Gaston Straus* were on the brief, for appellants.

Mr. Assistant Attorney General Donovan, with whom the *Solicitor General* was on the brief, for appellee.

There is a difference of opinion between the two departments of the Government which are directly concerned with the administration of the Act. The Department of Labor is of opinion that the Act requires the exclusion of these appellants. The Department of State is of opinion that the Act and the Treaty together require their admission. In view of the importance of this case, counsel for the Government feel it their duty to submit reasons in support of both opinions. Accordingly, in their brief is set forth the reasoning in support of the exclusion theory maintained by the Department of Labor; in an appendix, the opposing arguments of the State Department, as embodied in a memorandum prepared by the Solicitor for that Department. The appellants are clearly "aliens ineligible to citizenship." They are therefore excluded by § 13(c) of the Act, unless they can establish their right to enter as "treaty merchants" under § 3(6). Section 3(6) grants

admission to " an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." Can it be said that the wife or the minor child of a merchant comes here " solely to carry on trade "? The agent of a merchant is not himself entitled to enter as a merchant. *Tulsidas* v. *Insular Collector,* 262 U. S. 258. And this Court in the *Gue Lim Case* did not hold that the wife of a merchant was entitled to enter " solely to carry on trade," but merely decided that she was entitled to enter solely to reside with her husband, as she then had the right to do. The purpose of § 3(6) was to take away that right by granting the right of entry only to actual merchants, and not, as formerly, to merchants and their families. Any other construction would deprive the section of its meaning. At the time when the *Gue Lim* decision was rendered, no statutory definition existed of the term " merchant "; and the Court accordingly construed the language of the treaty as including both merchants and their families. The Court might have decided the *Gue Lim Case* differently had § 3(6) then been in existence. It was inserted at the request of the Secretary of State, for the purpose of safeguarding treaty rights, but in its final form is very different from the provision which the Secretary originally suggested; and it is possible that the effect of the alteration is to exclude the wives and children of merchants. Whatever might have been the result had Congress enacted, *totidem verbis,* either of the Secretary's suggestions, it is submitted that the case must be judged upon the law as it is written. The Committee Report indicates that Congress intended to " tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation." The effect of § 3(6), as actually passed by Congress, may be to deny the right of

entry to all who do not come here "solely to carry on trade." In opposition to this view counsel cite the case of *Anderson* v. *Watt*, 138 U. S. 694, 706, and other cases holding that the domicil of the husband is the domicil of the wife, and that the identity of the wife is, in a sense, merged in that of the husband. But has not this theory lost much of its force since the enactment of the Act of September 22, 1922, c. 411, 42 Stat. 1021, under which the citizenship of the wife no longer follows that of the husband? And the Immigration Acts often operate to prevent husband and wife from residing together in this country. Yet this Court, when appealed to on the ground of hardship, has declined to interfere. *Commisisoner of Immigration* v. *Gottlieb*, 265 U. S. 310; *Chung Fook* v. *White*, 264 U. S. 443; *Yee Won* v. *White*, 256 U. S. 399.

In the next place § 5 of the Act provides "An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." It may well be that the appellants have no right of entry in and of themselves; their right of entry is dependent, not upon their own status, but upon that of their husbands or fathers. And if that is so, then they are excluded by the operation of § 5. Congress has been careful to grant admission to the families of Chinese government officials § 3(1), and to the families of Chinese clergymen or professors §§ 4(d), 13(c) (2); and from this fact it may be inferred that Congress did not intend to grant admission to the families of Chinese merchants, according to the maxim *expressio unius*. *Lapina* v. *Williams*, 232 U. S. 78, 92; *United States* v. *Goldenberg*, 168 U. S. 95, 103. It is conceded that a strong presumption exists in favor of maintaining treaty rights. The right of these appellants

to enter this country is a right conferred, if not by the letter of the treaty, at least by the treaty as interpreted by this Court. But it is submitted that even treaty rights can not prevail against the language of the Immigration Act of 1924. And under §§ 5 and 13(c) of that Act, it is doubtful whether these appellants can enter.

Such is the contention of the Department of Labor; but this Court should also consider the careful and well-reasoned opinion of the Solicitor for the Department of State, before answering the question.

The following is excerpted from a memorandum by *Hon. Charles Cheney Hyde,* Solicitor for the State Department, which was appended to the brief of appellee:

Wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter. The courts of the United States, when interpreting the treaties of their country, act on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, *Ubeda* v. *Zialcita,* 226 U. S. 452, 454; that their agreement should be interpreted "in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose," *Tucker* v. *Alexandroff,* 183 U. S. 424, 437; and that its terms should be liberally construed, *Asakura* v. *Seattle,* 265 U. S. 332, 342; *Haunstein* v. *Lynham,* 100 U. S. 483; *Geofroy* v. *Riggs,* 133 U. S. 258; *Tucker* v. *Alexandroff, supra.*

The commercial treaties of the United States providing for the entrance and residence of nationals of one contracting party into the territories of the other for the purposes of trade have not made mention of the wives and minor children of such individuals. It seems to have been taken for granted that there is such unity of interest in the individual family that the head thereof, if given

the right to enter a country for purposes of trade, is the representative of an entity embracing his wife and children who are not to be dissociated from him. This conclusion is fortified by the fact that treaties with Japan, China, and other countries contemplate prolonged and undetermined residence for the purposes of trade, the occupation of dwellings, and by necessary inference the establishment of homes. [Citing treaties.]

It would scarcely be suggested that each of these treaties should be interpreted differently in accordance with the exact words used. Such literal construction could not give effect to the intent of the contracting parties, nor could it avail to carry out the general purposes for which such treaties are concluded. It is believed that the varying terms of all these treaties may be properly paraphrased thus: "The contracting parties agree that their citizens and subjects, respectively, shall have a right to come into the territories of the other for the purpose of carrying on international trade, and they are accorded the privilege of remaining indefinitely in the country, of establishing their homes and of bringing with them for this purpose the members of their families so long as they are here for that purpose."

An examination of the original signed copy of the treaty of 1880 with China, in the archives of the Department of State, reveals that there is nothing therein which can be regarded as a title, although in Malloy's compilation (Vol. 1, p. 237) it is given the caption, "Immigration Treaty." In so far as the Chinese treaty refers to merchants, and provides for their entry into the United States, it seems entirely reasonable and proper to consider it as a "treaty of commerce and navigation." It would be unreasonable to assume in the absence of convincing evidence that the United States and Japan, for example, sought, on the one hand, to give traders the right to enter, remain, and reside for an indefinite period for the purposes

of trade, and, on the other, to isolate them while exercising that privilege from their wives and minor children.

An important social policy well recognized in the Anglo-American system lies at the foundation of this principle. Our courts have recognized the identity of interest which exists between husband and wife. The wife is an integral part of the husband's sphere of activity. *Anderson* v. *Watt*, 138 U. S. 694. The Supreme Court of the United States in deciding *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, interpreted the treaty between the United States and China of November 17, 1880 (22 Stat. 826), in a manner that sustains this conclusion. See *In re Chung Toy Ho*, 42 Fed. 398; *Ex Parte Goon Dip*, 1 Fed. (2d) 811; *Ex Parte So Hakp Yon*, 1 Fed. (2d) 814; *Yee Won* v. *White*, 256 U. S. 399; *Woo Hoo* v. *White*, 243 Fed. 541; see also *In re Chin Hern Shu*, D. C. Mass., Dec. 11, 1924 (*unreported*).

It is never to be supposed that an Act of Congress overrides the provisions of a treaty unless its words are so clear that there is no escape from that conclusion. *Chew Heong* v. *United States*, 112 U. S. 536. Section 3(6) of the Immigration Act of 1924 classifies as a non-immigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of Commerce and Navigation." Section 13(c) provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien . . . is not an immigrant as defined in Section 3." If we assume that aside from the Act wives and minor children of merchants are given by the treaty a right to enter the United States, it is obvious that no argument for their exclusion under the Act could arise except for the words "solely to carry on trade," which appear in § 3(6). It is argued that this phrase was directed against the wives and children of merchants, on the ground that any other construction deprives this phrase of all meaning. However, such is not the case.

In view of its legislative history, it is believed that this phraseology was adopted with a desire to grant full rights to persons entitled to enter under treaties of commerce and navigation—to show that the treaty provisions referred to were only those provisions respecting privileges of commerce and navigation, and that the class of persons referred to was the merchant class within the scope of those provisions.

There is another apparent reason for the use of the phrase "solely to carry on trade" as used in § 3(6). The various treaties of commerce and navigation do not refer exclusively to merchants. A right of entry is also accorded to ships (and necessarily to their crews) and to temporary visitors. Congress had already provided for alien seamen in § 19 of the Act and for visitors or travelers in § 3(2). The phrasing of § 3(6) seems to have been adopted partly to avoid a conflict with or repetition of §§ 3(2) and 19, and was designedly supplemental thereto. The evidence is abundant and convincing that Congress itself not only had no desire to curtail the treaty right, but also deliberately undertook to respect the treaty right to enter of all who were clothed therewith.

Mr. Henry W. Taft filed a brief as *amicus curiae* by special leave of Court.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioners are alien wives and minor children of resident Chinese merchants lawfully domiciled within the United States. They departed from China on the Steamship President Lincoln, and upon arrival at San Francisco, July 11, 1924, sought permanent admission to the United States. The Secretary of Labor denied their applications and gave the following reasons therefor—

"Neither the mercantile status of the husband and father, nor the applicant's relationship to him, has been

investigated for the reason that even if it were conceded that both these elements exist the applicants would be inadmissible as a matter of law. This is made necessary because of the inhibition against their coming to the United States as found in Paragraph (c) of Section 13 and that portion of Section 5 which reads as follows: 'An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.' "

The court below has inquired, Jud. Code § 239: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

Prior to July 1, 1924, petitioners, if otherwise unobjectionable, might have been admitted notwithstanding their race and nationality. *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, 466, 468; *Yee Won* v. *White*, 256 U. S. 399, 400, 401. But it is said they are absolutely excluded by the "Act to limit the immigration of aliens into the United States, and for other purposes," approved May 26, 1924, c. 190, 43 Stat. 153, applicable provisions of which follow—

"Sec. 13. . . . (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

"Sec. 3. When used in this Act the term 'immigrant' means any alien departing from any place outside the

United States destined for the United States, except . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Sec. 5. When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

The present existing treaty of commerce and navigation with China, dated November 17, 1880, 22 Stat. 826, 827, provides—

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

An alien entitled to enter the United States "solely to carry on trade" under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, § 3(6), and therefore is not absolutely excluded by § 13.

The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July first when the present Immigration Act became effective. *United States* v. *Mrs. Gue Lim, supra.* That Act must be construed with the view to preserve treaty rights unless clearly

annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

In a certain sense it is true that petitioners did not come "solely to carry on trade." But Mrs. Gue Lim did not come as a "merchant." She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the Act now before us.

Nor do we think the language of § 5 is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the Act itself as "non-immigrants." They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago.

The question propounded by the court below must be answered in the *negative*.